87-2058

No. ———

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

—o—

CORNHUSKER CHRISTIAN CHILDRENS HOME, INC.,
A Nebraska Nonprofit Corporation,

Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, et al.,

Appellees.

—o—

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

—o—

JURISDICTIONAL STATEMENT

—o—

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QUESTIONS PRESENTED

I.

Whether refusal of Nebraska Supreme Court to resolve Cornhusker's fourteenth amendment questions, questions that court expressly found were raised both at trial and on appeal, violates due process and supremacy clauses of the Constitution of the United States where, in context of decision on appeal, refusal necessarily resolved questions against Cornhusker.

II.

Whether Regulation 6-005.26K violates fourteenth amendment parental liberty interests by imposing a state policy choice regarding the appropriate way to discipline children in the absence of a showing either that Cornhusker harmed or abused children or that Regulation 6-005.26K implements a compelling state interest by the least drastic means.

A.

Whether, in the absence of any such showing of harm or compelling need and least drastic means, a person in loco parentis and situated such as Cornhusker has the same fourteenth amendment liberty interest to guide and discipline a custodial child as has a natural or adoptive parent.

B.

Whether Regulation 6-005.26K unconstitutionally overrides a natural parent's right to make decisions regarding the discipline of a child when placing that child with Cornhusker.

LIST OF PARTIES AND AFFILIATED CORPORATIONS

Also listed as Appellees herein are the Director of the Department of Social Services of the State of Nebraska (formerly Gina C. Dunning, presently Kermit McMurry); the Attorney General of the State of Nebraska (formerly Paul L. Douglas, presently Robert A. Spire); the Governor of the State of Nebraska (formerly Robert C. Kerrey, presently Kay Orr); and the State of Nebraska.

There are no parent companies, subsidiaries or affiliates of the Appellant.

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JURISDICTIONAL STATEMENT

Cornhusker Christian Childrens Home, Inc., Appellant, ("Cornhusker") appeals from a final judgment of the Supreme Court of Nebraska dated December 11, 1987, which validated a regulation, Neb. Admin. Code tit. 474, ch. 6, section 6-005.26K (1983) ("Regulation 6-005.26K") promulgated by one of the Appellees, Nebraska Department of Social Services, ("DSS"). Regulation 6-005.26K prohibits the use of reasonable corporate punishment by licensed 24-hour residential childcare facilities such as Cornhusker. The Nebraska Supreme Court validated this regulation on state law grounds in spite of Cornhusker's claim that the regulation violated the liberty interests of Cornhusker and of parents with children placed at Cornhusker, liberty interests protected by the fourteenth amendment to the Constitution of the United States.

OPINIONS BELOW

The opinion of the trial court is unreported. Appendix, App. 1.* The opinion of the Supreme Court of Nebraska is reported at 227 Neb. 94, 416 N.W.2d 551 (1987). App. 8. Cornhusker timely filed a motion for a rehearing which was denied on March 16, 1988. App. 38. Cornhusker then moved for a certification of the federal question by the Nebraska Supreme Court. On May 10, 1988, the Nebraska Supreme Court denied the motion. App. 39.

JURISDICTION

This is an appeal from a final judgment of the Nebraska Supreme Court validating DSS Regulation 6-005.

*Citations to the Appendix will be referred to as App. —.

26K. The court's decision, dated December 11, 1987, reversed the declaratory judgment by the trial court in Cornhusker's favor. On March 16, 1988, the Nebraska Supreme Court denied Cornhusker's motion for a rehearing. App. 38. On May 10, 1988, the court refused to certify the federal question. App. 39. The Notice of Appeal to the United States Supreme Court was filed with the Nebraska Supreme Court on May 27, 1988. App. 41.

Regulation 6-005.26K is legislative in character with state-wide effect. Jurisdiction to hear this appeal thus rests on 28 U.S.C. § 1257(2) (1966). *Lathrop v. Donohue,* 367 U.S. 820, 825 (1961).

The controversy between Cornhusker and DSS is concrete and justiciable. Cornhusker amended its internal discipline policy in compliance with Regulation 6-005.26K expressly and only to avoid license revocation. Thereafter, Cornhusker immediately filed an action for declaratory judgment contesting the validity of the regulation on state law and federal constitutional grounds. Not only is a showing of impending injury (rather than actual license revocation) sufficient to satisfy justiciability concerns; *Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967); *Columbia Broadcasting System v. United States,* 316 U.S. 407, 418-419 (1942); *Pierce v. Society of Sisters,* 268 U.S. 510, 526 (1925); *Pennsylvania v. West Virginia,* 262 U.S. 553, 593 (1923); but failure of this Court to review leaves intact the decision of regulation validity and commits Cornhusker to continued compliance.

The peculiar posture of this appeal is that while (1) there *IS* a federal constitutional question involved concerning the validity of Regulation 6-005.26K under the due process clause of the fourteenth amendment to the

Constitution of the United States; and (2), as the Nebraska Supreme Court itself expressly so found (App. 39), Cornhusker raised that question both at trial and again on appeal to the Nebraska Supreme Court; nevertheless, the Nebraska Supreme Court reversed the trial court decision in favor of Cornhusker solely on the basis of state law and refused to consider the federal question. The court refused, moreover, not because of any procedural default by Cornhusker and even though its reversal of the trial court decision in Cornhusker's favor had the net effect of upholding the regulation on state AND federal grounds.

When, as here, a citizen seeks judicial relief from a claimed constitutional infringement, and when, as here, a citizen raises and preserves that claim at trial and on appeal, then that citizen must be afforded a judicial hearing and determination of that claim when, as here, it is dispositive of the matter brought before the court. *See Lawrence v. Tax Comm'n,* 286 U.S. 276 (1932). In such a situation, a denial on non-federal grounds never can rest upon a fair and substantial basis because it always infringes on rights guaranteed by the Constitution of the United States. *Id.* at 282. *See Ward v. Love County,* 235 U.S. 17, 22 (1920). Thus the jurisdiction of this Court properly is invoked.

CONSTITUTIONAL PROVISIONS AND REGULATIONS

U.S. Const. Amend. XIV

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction, equal protection of the laws.

U.S. Const. art. VI

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwith standing.

Neb. Amend. Code, tit. 474, ch 6, section 6-005.26K (1983)

Discipline: Each agency shall develop written policies regarding discipline.

Agency Staff Shall—

1. Use discipline only as a learning process in which certain specified consequences are the result of unacceptable behavior; and

2. Never use the following as discipline:

   a. Physical punishment or abuse;

   b. Denial of necessities;

   c. Chemical or mechanical restraints; or

   d. Derogatory remarks, abusive or profane language, yelling or screaming, or threats of physical punishment.

Neb. Admin. Code, tit. 474, ch. 6, section 6-005.26K1 (1983)

Lock-Up Facility: If a lock-up facility is needed, the agency shall develop written procedures for its use. A log containing the following information must be kept:

1. Name of the child being isolated;

2. The reason for the isolation;

3. The date and times the lock-up began and ended;

4. The staff who assigned the child to lock-up; and

5. The time the child was checked for condition, who checked on the child, and the child's condition.

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STATEMENT OF THE CASE

A. How the Federal Question Was Raised

In its petition for declaratory relief (App. 43), in argument to the trial court, in its two briefs (as appellee and on motion for rehearing) before the Nebraska Supreme Court (App. 45; App. 47), on oral argument before that Court, and, finally, in its Motion for Certification of a Federal Question, Cornhusker raised the fundamental fourteenth amendment parental right to promote the education and welfare of children in its custody, including the right to use reasonable force to discipline.

B. Facts Material to Question Presented

Cornhusker, a nonprofit corporation formed in 1970, is located on a 160-acre ranch in Hitchcock County, Nebraska. Cornhusker provides 24-hour residential care to children placed by parents, courts, and DSS. The children attend the public schools in Culbertson, Nebraska. Cornhusker pays taxes on a portion of its property to support the local school system.

The children live in cottages in a family type atmosphere with permanent house parents and their natural children. The house parents assume the responsibilities

and duties of natural parents to the children placed in their care.

Each cottage is a large seven bedroom home containing kitchen and dining room facilities, a social area and bedrooms. At the time of trial, Cornhusker cared for four girls and eleven boys ranging in age from eight to sixteen years old. Of these fifteen children, two were placed by the courts and thirteen placed by their natural parents or guardians.

Prior to October 1983 Cornhusker had a written policy on discipline that permitted a house parent to use reasonable corporal punishment (swatting a child on the buttock with an open hand). See App. 49. Such punishment was used only after counseling and other measures failed and only after explaining to the child the reason for its use.

This policy was approved by DSS, the licensing agency for Cornhusker, and remained in effect from 1970 until September 1983. At that time DSS promulgated Regulation 6-005.26K which prohibited the use of corporal punishment in licensed 24-hour care facilities such as Cornhusker. (See Constitutional Provisions and Regulations *supra.*) Under protest, and only to insure that its operating license would not be revoked by DSS, Cornhusker amended its disciplinary policy to conform to Regulation 6-005.26K. Thereafter Cornhusker sought declaratory relief to invalidate Regulation 6-005.26K on state law and federal constitutional grounds.

The trial court found the regulation invalid on state law grounds and never reached Cornhusker's federal constitutional ground for relief. The Supreme Court of Nebraska reversed the trial court and held the regulation valid under state law. It then expressly refused to con-

sider the federal constitutional question. This refusal not only deprived Cornhusker of a full and complete adjudication of the validity of Regulation 6-005.26K, but it had the effect of validating the regulation for purposes of both state and federal law.

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THE FEDERAL QUESTIONS ARE SUBSTANTIAL

In refusing to consider the federal constitutional questions properly raised by Cornhusker, the Nebraska Superme Court violated the supremacy clause of Art. VI of the United States Constitution by elevating a peculiar state appellate procedure over Cornhusker's right to be heard in state court on a federal claim. Similarly, the court's failure to entertain the federal constitutional ground offended Cornhusker's fourteenth amendment due process right to a fair hearing on a claim properly brought.

The consequences of the court's refusal, moreover, are more far-reaching than the injury to Cornhusker. The Nebraska Supreme Court refused to hear Cornhusker's federal claim—even though dispositive—although the court found neither procedural default by Cornhusker nor a factual circumstance unique to this case. The court's interpretation of state appellate procedure thus will affect other litigants. As such, it constitutes a continuing affront to the supremacy of federal law and to a litigant's due process right to be heard.

The questions raised by Cornhusker concerning a protected parental liberty interest under the fourteenth amendment to the United States Constitution also are substantial. With regard to the parents who themselves have placed children in Cornhusker's care, Regulation 6-005.26K is

a remarkable state intrusion on a clear and oft-recognized parental liberty interest to control and direct the welfare of a child. Cornhusker's independent claim to a liberty interest is substantial both because of the continuing injury to Cornhusker (and to the appropriate development of the children placed in its care) and because the claim is a novel and complex question of constitutional law that increasingly is being raised and addressed by lower federal and state courts.

I

REFUSAL OF NEBRASKA SUPREME COURT TO RESOLVE CORNHUSKER'S FOURTEENTH AMENDMENT QUESTIONS, QUESTIONS THAT COURT EXPRESSLY FOUND WERE RAISED BOTH AT TRIAL AND ON APPEAL, VIOLATES DUE PROCESS AND SUPREMACY CLAUSES OF CONSTITUTION OF THE UNITED STATES WHERE, IN CONTEXT OF DECISION ON APPEAL, REFUSAL NECESSARILY RESOLVED QUESTIONS AGAINST CORNHUSKER

The treatment on appeal of this case by the Nebraska Supreme Court is a classic situation in which "not to consider was to consider and not to decide was to decide." The effect of the court's action is that Cornhusker lost on the merits of its fourteenth amendment claim although no court ever considered the merits. And Cornhusker lost, as is evident from the Nebraska Supreme Court Order Denying Appellee's Motion to Certify a Federal Question (App. 39), not because of any procedural default on its part. It lost because, ironically, it was too successful at trial in the first place. A brief recitation of the pertinent procedural history makes this clear.

Cornhusker filed an action for declaratory judgment and injunctive relief against DSS. Cornhusker challenged as invalid DSS Regulation 6-005.26K, a regulation that

under all circumstances prohibits any spanking or similar physical punishment of children living in facilities licensed by DSS. Cornhusker's challenge to the validity of the regulation was two-pronged. The first challenge alleged invalidity as a matter of state law, particularly Neb. Rev. Stat. § 43-708 (Reissue 1984). The second challenge alleged that the regulation was unconstitutional under the fourteenth amendment to the Constitution of the United States. App. 43.

The trial was held before then district judge, now Nebraska Supreme Court Judge Dale Fahrnbruch. Both grounds were litigated. Both grounds were argued in summation. Judge Fahrnbruch declared Regulation 6-005.26K invalid under state law. App. 1. Because this ruling in favor of Cornhusker was dispositive of Cornhusker's entire case, the second ground for holding the regulation invalid—its unconstitutionality under the fourteenth amendment—never was reached.

DSS appealed to the Nebraska Supreme Court. It assigned as error the decision that Regulation 6-005.26K was invalid under state law. In its reply brief Cornhusker argued in support of the state-law ground for deciding regulation invalidity. As at trial, it also argued for regulation invalidity by raising its second ground in support, that the regulation offended the fourteenth amendment. App. 45.

The Nebraska Supreme Court simply reversed the trial judge's decision. Because the court's opinion did not adequately address Cornhusker's federal constitutional ground supporting regulation invalidity, Cornhusker moved for rehearing. App. 47. The Nebraska Supreme Court denied the motion for rehearing without opinion.

Cornhusker next moved for an order from the Nebraska Supreme Court certifying that the court had considered Cornhusker's federal constitutional ground and decided it adversely to Cornhusker. Much to Cornhusker's surprise, the Nebraska Supreme Court answered that, although the fourteenth amendment ground for regulation invalidity had been raised at trial and on appeal, the court had not considered it in deciding the case. The court's order reads, in pertinent part (for Order in its entirety, see App. 39):

> [this] court finds that although *appellee* [*Cornhusker*], *in its petition for declaratory judgment, alleged certain violations of the U.S. Constitution, and on appeal to this court, reiterated these arguments in its brief*, nevertheless, in its declaratory judgment, the district court did not address any of the constitutional issues, but, rather, decided the case in favor of appellee solely on the basis of the voidness of the appellant's regulation under Nebraska statutes.
>
> This court further finds that on appeal to this court, the errors assigned by the appellants were restricted to matters of public policy of the State of Nebraska and the invalidity of the Department of Social Services' regulations vis-a-vis the Nebraska statutes. Accordingly, this court limited its decision to such claimed errors . . . .

(Emphasis added.) The court added, moreover, that Cornhusker could not have cross appealed to preserve its federal constitutional ground "for the reason that in the absence of an express finding by the district court on an issue adverse to an appellee, a cross-appeal in reference to such issue may not be had. . . ."

In other words, as interpreted by the Nebraska Supreme Court, state procedure precluded appellate review of the federal ground because Cornhusker neither lost on the federal ground at trial (in which case Cornhusker clearly would have been entitled to appeal or cross appeal) nor won on that basis (in which case the Attorney General could have appealed). The procedural anomaly is that Cornhusker lost its opportunity to prevail on appeal precisely because it prevailed at trial. If it had lost on both grounds at trial, then Nebraska procedure would have required that the trial court *and* the Nebraska Supreme Court consider the federal ground in deciding the validity of the regulation.

Cornhusker obtained no review of its fourteenth amendment ground supporting its plea for declaratory and injunctive relief even though (1) it did all that Nebraska law required or permitted to properly raise and preserve the ground and (2) the effect of the Nebraska Supreme Court reversal was not simply to reverse the state-law ground on which the trial decision was based but to reverse the result itself. Thus the effect of the reversal is to make Regulation 6-005.26K valid as a matter of both state *and* federal law. For a litigant like Cornhusker, which properly raised and preserved its federal ground, the impact of Nebraska appellate procedure is remarkable and its unconstitutionality apparent.

There is no gainsaying that under the supremacy clause a state court otherwise competent may not refuse to decide a federal question simply because it is a federal question. U.S. Const. art. VI. *See, e.g., Testa v. Katt,* 330 U.S. 386 (1947); *Martin v. Hunter's Lessee,* 14 U.S.

(1 Wheat.) 304 (1816). There equally is no gainsaying that, at least absent a substantial state interest, refusal of a court to hear a case in the first instance that both is properly presented and within the subject matter jurisdiction of that court is a violation of the due process clauses of the fifth and fourteenth amendments to the Constitution of the United States. U.S. Const. amend. V; XIV; *Boddie v. Connecticut,* 401 U.S. 371 (1971); *Ex Parte Hull,* 312 U.S. 546 (1941); *Grannis v. Ordean,* 234 U.S. 385, 394 (1914).

Certainly the Nebraska trial judge constitutionally could neither have refused outright to hear the declaratory judgment action brought by Cornhusker nor have taken the case, resolved the state ground adverse to Cornhusker, and then refused to entertain the federal ground in support of regulation invalidity. The intervention of the appellate process changes neither the due process nor supremacy clause injury. Once, therefore, the Nebraska Supreme Court disagreed with the trial judge's finding that the state-law ground supported regulation invalidity, the Constitution of the United States compelled consideration of the federal ground in support of same. *See Lawrence v. Tax Comm'n,* 286 U.S. 276 (1932). Refusal to consider the federal ground rendered the state-law ground dispositive of Cornhusker's entire case. The federal ground received no more attention by the Nebraska courts than it would have received had Cornhusker never raised it at all.

As applied to Cornhusker's appeal, the Nebraska Supreme Court's refusal to entertain the federal constitutional ground offended Cornhusker's fourteenth amendment due process right to a fair hearing on a claim properly brought. By elevating a peculiar procedural system

over Cornhusker's right to be heard in state court on a federal claim, the court's refusal similarly violated the supremacy clause.

Yet the consequences of the court's refusal, bad as they are, are more far-reaching than a denial of due process to one litigant and a one-time affront to the federal system and a state court's obligations within it. They are more far-reaching because they are likely to recur. The Nebraska Supreme Court, after all, based its refusal to consider Cornhusker's federal ground on an interpretation of Nebraska appellate procedure that the court stated clearly, directly, and with full notice of its impact. App. 47; App. 39. Unless this Court speaks, that interpretation will continue.[1] Unless this Court speaks, other litigants likely will come forward who similarly do everything right and are similarly refused a hearing by the Nebraska courts.

Cornhusker urges this Court to hold unconstitutional the Nebraska appellate procedure as applied to an appellee in state court in circumstances similar to those in which Cornhusker found itself. Cornhusker also urges this Court not to remand but instead to exercise its independent judgment to deal with the federal constitutional questions properly in the case before this Court. *See Michigan v. Long*, 463 U.S. 1032 (1983); *Saunders v. Shaw*, 244 U.S. 317 (1917).

The Nebraska Supreme Court already has had more than adequate opportunity to consider and pass on the

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[1]Although the supremacy clause violation will recur only when a federal question is lost through this peculiar state procedure, the due process denial will occur whether it is a federal or state ground that is ignored on appeal.

questions raised in Point II of this Jurisdictional Statement. *See Cardinale v. Louisiana,* 394 U.S. 437 (1969). The questions presented here were litigated and argued at trial. They have been twice raised, once argued orally, and twice fully briefed before the Nebraska Supreme Court. They then again were presented to the Nebraska Supreme Court in the form of a motion to certify a federal question. The Nebraska Supreme Court first silently, and then formally, refused to entertain them.

Resolution of the questions in Point II requires no additional finding of facts; the record on appeal is complete and adequate. Nor are there state law questions yet to be resolved. The questions in Point II are exclusively legal, exclusively federal, and exclusively constitutional. They represent not only novel, complex questions of federal law, but questions that increasingly are being addressed by lower courts, state and federal. See Point II, Part A.

A remand to permit the Nebraska Supreme Court to decide these questions clearly would not insulate that decision from later review by this Court, the final arbiter on the meaning of the Constitution of the United States. At this stage, then, a remand for Nebraska Supreme Court determination of the federal constitutional questions, questions ripe for review and exclusively legal and federal, would impose yet more costs, more delay and another procedural obstacle to be overcome by a litigant that already has expended great effort, time, and money in seeking a review to which constitutionally it is entitled. Cornhusker did everything possible to get the Nebraska Supreme Court to consider the federal constitutional issues before seeking review in this Court. It therefore urges its substantive federal constitutional day in court now.

II

REGULATION 6-005.26K VIOLATES FOURTEENTH AMENDMENT PARENTAL LIBERTY INTERESTS BY IMPOSING A STATE POLICY CHOICE REGARDING THE APPROPRIATE WAY TO DISCIPLINE CHILDREN IN THE ABSENCE OF A SHOWING EITHER THAT CORNHUSKER HARMED OR ABUSED CHILDREN OR THAT REGULATION 6-005.26K IMPLEMENTS A COMPELLING STATE INTEREST BY THE LEAST DRASTIC MEANS

A

IN THE ABSENCE OF ANY SUCH SHOWING OF HARM OR COMPELLING NEED AND LEAST DRASTIC MEANS, A PERSON IN LOCO PARENTIS AND SITUATED SUCH AS CORNHUSKER HAS THE SAME FOURTEENTH AMENDMENT LIBERTY INTEREST TO GUIDE AND DISCIPLINE A CUSTODIAL CHILD AS HAS A NATURAL OR ADOPTIVE PARENT

In common with all other jurisdictions, Nebraska defines a person in loco parentis as one who has assumed the parental role without undertaking formal adoption and who has, during the custodial period, the same "rights, duties, and liabilities" as a natural parent. *Austin v. Austin,* 147 Neb. 109, 22 N.W. 2d 560 (1946); *Cornhusker Christian Childrens Home v. Department of Social Services,* 227 Neb. 94, 416 N.W. 2d 551 (1987). App. 8. See, *e.g., Banks v. United States,* 267 F.2d 535 (2d Cir. 1959); *Niewiadomski v. United States,* 159 F.2d 683 (6th Cir. 1947), *cert. denied,* 331 U.S. 850 (1947). The role of parent is to assist a child's growth into a responsible, well-rounded, caring, and capable adult. It includes the responsibility to love and nurture, to control, educate, and support (both in an economic and emotional sense), to protect from physical and moral injury, and to discipline as neces-

sary to discharge the parental duty. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The Nebraska Supreme Court expressly found that Cornhusker stands in loco parentis to the children in its care. *Cornhusker*, 227 Neb. at 107, 416 N.W.2d at 556. App. 25. On the facts and record in this case that finding is amply supported and compels a decision by this Court that (1) the relationship of Cornhusker to the children in its care is a liberty interest protected by the fourteenth amendment to the Constitution of the United States and (2) its liberty interest permits Cornhusker to decide as would a natural parent, subject to the same constraints to assure against abuse; whether, when, and what discipline is necessary to fulfill its parental responsibilities.

It is clear from the record that Cornhusker offers a home and homelike atmosphere to the children in its care. Children reside in cottages located on a 160 acre ranch. (21:25). Each cottage is a seven bedroom home complete with kitchen, dining room, and social area. (21:15-20). The children attend local public schools and Cornhusker pays taxes on part of its property to support the local school system. (25:9-13).

Cornhusker employs husband and wife teams as house parents who head the cottage family unit, and, together with their natural children, live and eat in the cottages and otherwise provide a normal home environment for the placed children. (21:15;85:13-22). House parents do not move from cottage to cottage. (86:6). When a child is placed in a cottage, that child normally remains there with the same house parents for his or her entire stay. (85:25).

Cornhusker's philosophy is to give the children real homes with parents who love and care for them. (31:18-

20; 32:2). Its success is borne out by the fact that quite often, and within a short period of time, the children see their house parents as "real' parents, even referring to them as "mom" and "dad." (31:23). This relationship between Cornhusker through its house parents and the children in its care has the same form and content as a healthy biological parent-child relationship. *See Smith v. Organization of Foster Families,* 431 U.S. 816, 839 (1977) (Court considered evidence that after a year a psychological tie is created that constitutes the substitute family the "real" family of the child).

As this Court frequently has recognized, protection of the liberty interest in family relationships is neither determined simply by, nor restricted exclusively to, biological blood relationships. Instead, "[t]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promoting a way of life' through the instruction of children as well as from the fact of blood relationship." *Foster Families,* 431 U.S. at 844; *Wisconsin v. Yoder,* 406 U.S. 205, 231-33 (1972). Fourteenth amendment protection may attach, therefore, whenever the heart of the relationship, biological or not, is one that creates and sustains family life. *E.g., Zablocki v. Redhail,* 434 U.S. 374, 384 (1978), (right to marry); *Carey v. Population Services Internat'l,* 431 U.S. 678, 684-685 (1977) (raising children); *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944) (raising and educating children); *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925) (educating children); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923) (raising and educating children); *Moore v. East Cleveland,* 431 U.S. 494, 499 (1977) (living with relatives).

This Court in *Foster Families* considered but left undecided whether a foster family is sufficiently akin to a natural family to create a liberty interest triggering procedural due process before removal of a foster child from a foster home either to be transferred to another home or to be returned to a natural parent. 431 U.S. at 846. The issue was left open even though the facts in *Foster Families* were that the foster parent was aware both that foster placement was considered temporary and that state policy preferred a natural to a foster home and even though, as the intervenor natural parents argued, a recognition of foster parent liberty interest sufficient to afford procedural due process unavoidably denigrated the fundamental and unarguable liberty interest of the natural parents.

The substitute parent liberty interest that the Court declined to decide in *Foster Families,* however, was raised in a far different context from that at issue here. In *Foster Families,* after all, the liberty interest asserted not only directly flouted the formal temporary nature of the foster parent custodial care arrangement, but its expression through procedural due process protection before removal of the child created a "virtually unavoidable tension" between the foster parent and the absolute right of the natural parent to the return of his child. *Foster Families,* 431 U.S. at 846. On the facts of this case, by contrast, there not only is no tension between Cornhusker and the natural parents of the placed children, but the relief Cornhusker seeks is completely consonant with those interests. At the time of trial, natural parent private placements constituted thirteen out of fifteen of the placements at Cornhusker. (21:10-13). In *each* and *every* one of these private placements the natural parent requested or ap-

proved the use of reasonable physical punishment as a disciplinary measure. (34:4-9). See Part B *infra.*

Several lower courts since *Foster Families* have also considered whether there is a procedurally protected liberty interest for foster parents who, as in *Foster Families,* seek to assert a right permanently to keep the children placed with them. *E.g., Drummond v. Fulton County Dept. of Family Serv.,* 563 F.2d 1200 (5th Cir. 1977) (*en banc*) (no liberty interest requiring procedural due process for foster parents seeking to adopt); *Kyees v. County Dept. of Public Welfare,* 600 F.2d 693 (7th Cir. 1979) (no liberty interest requiring procedural due process for foster parents challenging child's removal); *Brown v. County of San Joaquin,* 601 F. Supp. 653 (E.D. Cal. 1985) (liberty interest requiring procedural due process for foster parents challenging child's removal). As in *Foster Families,* the stumbling block for the *Drummond* and *Kyees* courts was the formally temporary nature of the child's stay and the conflict between the interests of the foster parents and those of both the natural parents and the child. None of the cases discusses the precise questions presented by Cornhusker—the scope of the fourteenth amendment liberty interest of an in loco parentis parent to function *as a* parent during the time that a child is in custodial care as well as the circumstances in which a state may intrude on the day-to-day working out of that parental relationship.

While expressly not considering Cornhusker's fourteenth amendment liberty interest, the Nebraska Supreme Court held that Regulation 6-005.26K was an appropriate expression of Nebraska's parens patriae power to assure the proper care and protection of children within the state. *Cornhusker,* 227 Neb. at 110, 416 N.W.2d at 544. App. 30.

Cornhusker does not dispute the DSS interest, indeed, obligation, to assure against the mistreatment of children in the state, whether cared for by natural or adoptive parents or in substitute homes such as that provided by Cornhusker. Nor does Cornhusker contest DSS authority regularly to inspect cottages and grounds, to interview children and house parents, and otherwise to assure that Cornhusker fulfills its obligations both to the state under Cornhusker's license to operate and, more importantly, to the children placed in its care.[2] What Cornhusker *does* dispute is the intrusion by DSS on its parental interest without any showing either of compelling need or least intrusive means.

The heart of the relationship between Cornhusker through its house parents and the children in its care vests in Cornhusker a constitutionally protected liberty interest to choose the reason for, manner, and timing of disciplining those children. Regulation 6-005.26K denies Cornhusker that liberty of choice simply on the assertion that Cornhusker has been licensed by the state. Clearly, however, the authority to license does not carry with it the authority to impose unconstitutional conditions on the licensee. *See, e.g., Frost v. Railroad Comm. of Cal.*, 271 U.S. 583, 593-94 (1926).

When government regulation infringes on a fundamental right the state must show both that the regulation is necessary to effect a compelling state interest and that no less intrusive means is available. *See Storer v. Brown*,

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[2]*State ex rel. O'Sullivan v. Heart Ministries*, 227 Kan. 244, 607 P.2d 1102 (1980), adverted to by the Nebraska Supreme Court in its opinion in the instant case, is inapposite because in *Heart Ministries* the facility contested (on first amendment free exercise grounds) *ANY* power in the state to license it or regulate its operations.

415 U.S. 724 (1974); *Shapiro v. Thomas,* 394 U.S. 618 (1969); *Speiser v. Randall,* 357 U.S. 513, 525-26 (1958). The state fails here on both counts.

Certainly protection of children from physical abuse is a compelling state interest. Equally certain, protection of children from a spanking is not. That fact not only is implicit in every court decision recognizing a parent's primary right to discipline (subject only to a state's parens patriae obligation to prevent serious physical or emotional abuse), but this Court explicitly recognized that in the ordinary case reasonable corporal punishment, *i.e.*, spanking of a child, "neither threatens seriously to violate any substantive right nor condemns the child to suffer grievous loss of any kind." *Ingraham v. Wright,* 430 U.S. 651, 678 (1977) (citations omitted). It follows, therefore, that since "corporal punishment administered by a parent is not unconstitutional, then a reasonable utilization of the same form of chastisement by a properly designated person is not prohibited." *Glaser v. Marietta,* 351 F. Supp 555, 558 (W.D. Pa. 1972).

Nor does either DSS or the Nebraska Supreme Court hold a contrary view. DSS permits spanking at day-care centers. (55:25; 56:1-3; 71:17-21.) Such day-care center spanking expressly was authorized by the Nebraska Supreme Court in its opinion in this case. 227 Neb. at 115, 416 N.W.2d at 565. App. 36.

Not only does Regulation 6-005.26K fail to effect a compelling state interest, but it is not narrowly tailored to focus on that state interest which *is* compelling—protection against child abuse. The State of Nebraska, through DSS and otherwise, already has at its disposal adequate and less drastic means to assure the proper care of children placed with Cornhusker. DSS regularly can inspect

cottages and grounds, and interview children, house parents, and other personnel. Neb. Rev. Stat. §§ 71-1903, -1912 (Reissue 1981). It has the power to revoke Cornhusker's license should problems exist. Rev. Stat. §§ 71-1911, -1915 (Reissue 1981).

The children at Cornhusker, ranging in age from eight to sixteen at the time of trial, (21:7), have the maturity and cognitive skills to articulate their concerns and to report abuse either experienced or observed. *See Department of Social Serv. v. Emmanuel Baptist,* 150 Mich. App. 254, 388 N.W.2d 326 (1986) (Regulation prohibiting corporal punishment upheld in face of first amendment challenge where palm-of-hand spanking was permitted and children, ranging in age from two and one-half to six, were too young to report abuse); *Johnson v. California Dept. of Social Serv.*, 123 Cal. App. 3d 878, 884, 177 Cal. Rptr. 49, (1981) (Regulation prohibiting corporal punishment upheld in face of equal protection challenge where no child was older than eight and most were preschool age children who "lack[ed] verbal skills and ability to protest abusive punishments.")

Furthermore, because the children placed with Cornhusker daily attend classes in the local public schools, they daily have the opportunity to report abuse to disinterested adults and to do so while unobserved by Cornhusker personnel. School personnel also obviously have an opportunity to make their own observations whether or not instigated by a child's report. School personnel, moreover, have an independent state reporting obligation should they suspect child abuse. Neb. Rev. Stat. § 28-711 (Reissue 1985). Willful failure so to report is a class III misdemeanor. Neb. Rev. Stat. § 28-717 (Reissue 1985). Cornhusker personnel are subject to the same reporting obliga-

tion as well as criminal sanction for those inflicting any such abuse. Neb. Rev. Stat. §§ 28-308 to -310 (Reissue 1985); §§ 38-115 to -117; § 43-706 (Reissue 1984).

The state nonetheless argues that Regulation 6-005.26K is necessary to prevent child abuse because there is a greater potential for abuse in a 24-hour care than in a day-care facility. Yet once again, and for at least six reasons, the regulation proves too much.

First of all, children residing with natural parents also are living in a 24-hour situation. DSS neither claims the right nor asserts any authority to regulate those situations.

Second, if the evil perceived by DSS is not solely in the duration of stay but in the duration combined with the absence of what DSS assumes is a caring relationship between natural parent and child, then DSS investigation and licensing can and should be sufficient to assure responsible care.

Third, because an open-palm swat on the fanny in and of itself is not child abuse (and markedly useful as many natural parents will attest) Regulation 6-005.26K must operate on the presumption that the authority to spank at all gives rise to a problem of going too far. Yet the record belies that presumption since there is no suggestion, much less actual evidence, that Cornhusker ever abused its liberty to spank or, for that matter, that any licensed facility in Nebraska ever abused that liberty. *Cornhusker,* 227 Neb. at 112, 416 N.W.2d at 563. App. 32.

Fourth, Regulation 6-005.26K does not detail whether or when punishment is due. While Cornhusker certainly does not advocate more regulation and more intrusion on its fundamental parenting obligation, the fact that all that is regulated is the particular form of punishment demon-

strates not only that the regulation is overinclusive but that it fails because it is underinclusive as well.

Fifth, and in some ways most troubling, Regulation 6-005.26K1, a companion regulation to Regulation 6-005.26K, provides an alternative form of punishment that Cornhusker considers more likely to harm—and if abusive—less likely to be observed than abusive spanking would be. The regulation permits Cornhusker to lock up a child of any age not only in complete isolation but for a period of time not restricted by regulation. (61:19; *See supra* text of Constitutional Provisions and Regulations.) So long as lighting, ventilation, and egress in case of fire requirements are met, the lock-up room may even be in a basement. (61:17-19; 62:8-13). Under its spanking policy, by contrast, Cornhusker permitted reasonable physical punishment (such as spanking on the buttocks by the open hand or a suitable instrument); it prohibited use of any punishment that might injure permanently or even temporarily or any punishment imposed as a result of anger or frustration rather than reasoned judgment. The policy also expressly prohibited a lock-up. (For full written policy, see App. 49.)

Reasonable minds at least may differ whether a spanking or a lock-up is more likely to harm a child even in a controlled setting or more likely to cause lasting harm when abused. For DSS to impose that choice on Cornhusker, a choice with which it is uncomfortable, intrudes on Cornhusker's parental liberty interest. DSS does more than intrude, moreover, it sabotages Cornhusker's effort to provide children a natural home environment.

Cottage parents obviously still may discipline their natural children by spanking. The regulation therefore inevitably promotes different treatment between the na-

tural and placed children of cottage parents. Nothing could be better calculated both to undermine the normal home environment that Cornhusker seeks to create and to promote resentment between natural and placed children.

Sixth, Regulation 6-005.26K is a remarkably ill-conceived approach to controlling the bad in loco parentis parent. The state may claim that lock-up controls are achieved by a log providing hours of lock-up, who assigned the child to lock-up, and who checked on the child. (65:15-22). If so, then similarly a log could control the exercise of the discretion to spank.

It in any event is true that the same potential for abuse in a 24-hour facility exists with the lock-up as with spanking. Logs may be incomplete or falsified. Children too young or too afraid to report physical abuse are equally too young or too afraid to report lock-up abuse.

DSS fails totally to explain why a regulation directed at that which is not child abuse will protect against that which is. Since, therefore, Regulation 6-005.26K neither effects a compelling state interest nor is the least intrusive means to effect a state interest even if that interest is compelling, DSS acts unconstitutionally when it intrudes on Cornhusker's parental liberty interest under the fourteenth amendment. The choice between spanking or lock-up should be that of Cornhusker, not DSS. This is even more clearly true when, as is the case with all but two of the children housed with Cornhusker, the decision to place was made by contract by the natural parent and thus the intrusion of the regulation intrudes on the natural parent's liberty interest as well as that of Cornhusker. See Part B.

B

REGULATION 6-005.26K UNCONSTITUTIONALLY OVERRIDES A NATURAL PARENT'S RIGHT TO MAKE DECISIONS REGARDING THE DISCIPLINE OF A CHILD WHEN PLACING THAT CHILD WITH CORNHUSKER

Freedom of personal choice in family matters is a fundamental protected liberty under the due process clause of the fourteenth amendment. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). Pre-eminent among these protected family liberty interests is that of a parent to control the care and nurturing of children. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Neither the DSS in its regulations nor the Supreme Court of Nebraska in its opinion takes the position that spanking is child abuse. Neither, moreover, asserts a direct right to prevent a parent from disciplining a child by spanking. In fact, both the Nebraska Supreme Court and the Nebraska Unicameral recognize a parent's primary right to control and direct the discipline of a child. *Cornhusker*, 227 Neb. at 110; 416 N.W.2d at 562; App. 30; Neb. Rev. Stat. § 43-708 (reissue 1984).

Certainly is it undisputed and indisputable that the fourteenth amendment to the United States Constitution vests in a parent the right to investigate, evaluate, and choose the appropriate discipline for a child absent a showing that the discipline is abusive. DSS unconstitutionally burdens a parent's exercise of that right. As such, DSS Regulation 6.005-26K is an illustration not of a state parens patriae power but of state paternalism of the worst kind.

At the time of trial Cornhusker had a total of fifteen children placed in its care. (20:25). Of these, only two were placed by DSS; the remaining thirteen children were placed by their natural parents. (21:10-13). Mr. Timothy Lowenstein, a member of the Board of Directors of Cornhusker, testified at trial that:

> . . . unequivocally, every parent who has made a private placement of their children with our Home has verbally granted permission and/or encouraged that if it was necessary to the application of corporal punishment for an infraction that the Home could be allowed to use it. . . .

(34:3). Thus Regulation 6-005.26K denies parents contracting with Cornhusker their fundamental parental right to investigate, evaluate, and decide on appropriate discipline for their children. In other words, Regulation 6-005.26K denies a natural parent the right to decide that for his child a spanking is better than a lock-up.

Because the fourteenth amendment rights of these natural parents are burdened, and this necessarily burdens the liberty interests of Cornhusker as set forth in Part A, Cornhusker can complain of the unwarranted interference by DSS with the rights of these parents. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In any event, as an appellant suffering an independent injury and with standing in its own right to seek redress for that injury, Cornhusker is "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [the] constitutional challenge fail. . . ." *Craig v. Boren*, 429 U.S. 190, 195 (1976).

Parents who place children with Cornhusker are attempting to meet their responsibilities for the care, nurturing, education, and moral and ethical development of their children. To demand this responsibility of these par-

ents without granting them the concurrent right to make choices so closely associated with these responsibilities is to deny, in the most basic sense, the constitutional liberty interest that a parent possesses.

An analysis of the liberty interests of parents to make disciplinary choices in the first instance does not involve the additional question whether a parent can delegate to another his fundamental parental liberty interest. Cornhusker believes that a natural parent does have the right to delegate, at least where the right is exercised consistent with a state's parens patriae power to prevent child abuse.[3] Regulation 6.005-26K additionally offends the rights of parents who place children with Cornhusker as it prevents these parents from giving Cornhusker both the child and the means the parent believes necessary and appropriate to effect responsible care for that child.

Finally, denial to Cornhusker of the right to use reasonable corporal punishment has burdened and will continue to burden the right of parents to choose Cornhusker to care for their children. Children now are being released from Cornhusker's care because it may not administer reasonable corporal punishment to enforce the behavioral expectations placed on the children by both Cornhusker and the natural parents of the children. (30:25-31:10).

The burden upon the liberty interest of the parents is clear. For the reasons given here and in Part A, DSS fails to justify the burden by showing a compelling state interest and an intrusion on fundamental liberty interests

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[3]To the extent that *Johnson v. California Dept. of Social Serv.*, 123 Cal. App. 3rd 878, 177 Cal. Rptr. 49 (1981) concerned simply the parent's right to delegate, then it is both ill-reasoned and distinguishable from this case; the Nebraska Supreme Court's apparent reliance on it is misguided as well as misplaced.

that is least drastic. Regulation 6.005-26K thus also fails as an unconstitutional violation of the natural parent's fundamental parental right to raise his child as he—and not as the State of Nebraska—sees fit.

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CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully Submitted,

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APPENDIX

IN THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

CORNHUSKER CHRISTIAN
CHILDREN'S HOME, INC.

v.

THE DEPARTMENT OF SOCIAL SERVICES
OF THE STATE OF NEBRASKA, et al.

DECLARATORY JUDGMENT
By
The Honorable Dale E. Fahrnbruch
December 6, 1985

Now, this matter came on for trial on September 26, 1985, on the pleadings and files, the parties being present by and through their respective counsel. Evidence was adduced by way of witnesses, depositions, and documents. All parties rested. The case was argued and the parties have submitted briefs. The Court being duly advised in the premises finds as follows:

1. That the Court has jurisdiction of the parties and subject matter thereto.

2. That the plaintiff herein has standing to bring this action.

3. That this is an action for declaratory and injunctive relief seeking a declaration that the Department of Social Services' regulation 474 Nebraska Administrative Code 6-005.26K 2.b., which in part prohibits physical punishment as discipline in licensed Child Caring Agencies, is invalid.

4. The evidence reflects that the plaintiff is a duly licensed Child Caring Agency under the provisions of Sec-

tions 71-1901 et seq., R.R.S. 1943. The plaintiff is licensed to care for 19 children and at the present time has 15 children in its care, 4 girls and 11 boys, ranging in age from 7 to 17. The plaintiff receives the placement of children from parents, guardians, courts and the Department of Social Services ("Department"). The home operates a 160 acre ranch near Culbertson, Hitchcock County, Nebraska. The children live in a family environment with house parents and the children of house parents in separate family homes or cottages. From 1970 until 1983, the plaintiff had a policy of using reasonable corporal punishment, i.e., spanking on the buttocks, which was approved by the Department. During this time, when punishment was administered, it was administered by the house parents in the presence of the superintendent or other staff members. In October of 1983, the Department amended its policy with respect to Child Caring Agencies to prohibit any form of physical punishment as a means of discipline and threatened not to renew plaintiff's license if it did not conform to the Department's new policy. The plaintiff amended its policy to conform in December of 1983.

5. That there is an actual and justifiable controversy between plaintiff and defendants.

6. The public policy of the State of Nebraska is not to prohibit reasonable corporal punishment. This policy is expressed in Sections 28-1413 and 43-708, R.R.S. 1943. Such public policy is also reflected in the common law of the State of Nebraska as pronounced in *Clausen v. Pruhs,* 69 Neb. 278, 95 N.W. 640 (1903) and *Fisher v. State,* 154 Neb. 166, 47 N.W.2d 349 (1951).

7. A parent may delegate authority to administer reasonable corporal punishment. See Section 43-708, R.R.S. 1943 and *Austin v. Austin,* 147 Neb. 109, 22 N.W.2d 560 (1946). Plaintiff has proved by a preponderance of the evidence that parents who have placed children with the plaintiff have specifically authorized the plaintiff to administer reasonable corporal punishment.

8. The house parents and superintendent of the plaintiff, which are those persons who administer reasonable corporal punishment, stand *in loco parentis* to a child in the care of the plaintiff since they have put themselves in the situation of a lawful parent in accordance with the principle set out in *Austin v. Austin,* 147 Neb. 109, 22 N.W.2d 560 (1946) as follows:

> "A person standing *in loco parentis* to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relationship is a question of intention which may be shown by the acts and declarations of the person alleged to stand in that relationship." *Id.* at 112, 113.

9. Since the house parents and superintendent of the plaintiff stand *in loco parentis,* they have the authority to use reasonable corporal punishment for discipline and control. See W. Prosser, The Law of Torts, 157 (4th Ed. 1971).

10. Plaintiff is another person similarly responsible for the general care and supervision of a minor or is a person acting at the request of such parent, guardian or

other responsible person within the meaning of subsection (1) of Section 28-1413, R.R.S. 1943.

11. Plaintiff is a person otherwise entrusted with the care or supervision for a special purpose of a minor within the meaning of subsection (2) of Section 28-1413, R.R.S. 1943.

12. That plaintiff, as a person within the meaning of Section 28-1413, R.R.S., is entitled to use such force as may be necessary for the purpose of safeguarding or promoting the welfare of a minor, including punishment of misconduct, if such force used is not designed to cause or known to create substantial risk of causing death or serious bodily harm. *State v. Miner,* 216 Neb. 309, 434 N.W.2d 899 (1984).

13. The Department of Social Services does permit the use of reasonable corporal punishment; to wit: spanking with an open hand on the buttocks with prior written permission from parent, in Family Day Care Homes licensed by the Department, but prohibits the use of reasonable corporal punishment by all other facilities, including plaintiff, licensed by the Department.

14. The Nebraska Legislature has not authorized the abolishment of reasonable corporal punishment. The Department's authorization of the use of reasonable corporal punishment in licensed Family Day Care Homes acknowledges that corporal punishment is a legitimate method of accomplishing the safeguarding or promoting the welfare of the minor, including the prevention or punishment of misconduct.

15. The distinction which the Department makes between licensed Family Day Care Homes and plaintiff's

home, with respect to reasonable corporal punishment, is arbitrary and capricious. The reason which the Department gives for authorizing it in Family Day Care Homes also exists in plaintiff's home since the punishment in plaintiff's home is administered by the house parents and if unreasonable force was being used, it likely would be reported to a higher authority by the other children in the house.

16. The Department has the duty to protect children from *unreasonable* corporal punishment. This could be achieved by requiring licensed care facilities such as the plaintiff to submit monthly reports in situations where corporal punishment had been administered and through investigation by the Department's personnel where there has been reasonable suspicion of the use of unreasonable corporal punishment.

17. The legal principles which govern the authority of the Department to act and pass regulations are as follows:

(a) The Department has no power or authority other than that specifically conferred upon it by statute. *Lincoln Elec. System v. Terpsma,* 207 Neb. 289, 298 N.W.2d 366 (1980).

(b) In order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated. *United States v. Larionoff,* 431 U.S. 864 (1977), cited in *County of Dodge v. Dept. of Health,* 218 Neb. 346, 355 N.W.2d 775 (1984).

(c) The Department cannot interpret its rules and regulations in such a manner so that self-inter-

preted rules and regulations contravene the statute which the agency is obligated to administer. *County of Dodge v. Dept. of Health, supra.*

(d) In the absence of valid statuory (sic) authority, the Department may not, under the guise of a regulation substitute its judgment for that of the Legislature. It may not exercise sublegislative powers to modify, alter, or enlarge the provision of the legislative act which is being administered. *Cray v. Kennedy* 230 Kan. 663, 640 P.2d 1219 (1982), cited with approval in *County of Dodge v. Dept. of Health, supra.*

(e) The Department may not employ its rule-making power to modify, alter, or enlarge provisions of a statute which it is charged with administering. *Beatrice Manor, Inc. v. Dept. of Health,* 219 Neb. 141, — N.W.2d — (1985).

(f) The Legislature may not lawfully delegate legislative powers to an administrative or executive authority. *Lincoln Dairy Co. v. Finigan,* 170 Neb. 777, 104 N.W.2d 227 (1960).

18. Any force which was permitted to be used or proposed to be used by plaintiff was used or is expected to be used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct.

19. That any force used or expected to be used was and is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain, mental distress or gross degradation.

20. Plaintiff believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and the use of such force is consistent with the welfare of the minor, and that the degree of force, if it had been used by the parent or guardian of the minor, is not unjustifiable under subdivision (1)(b) of Section 28-1413, R.R.S. 1943.

21. That Regulation 6-005.26K, in so far as it prohibits reasonable corporal punishment, should be declared void since it exceeds the authority and power of the Department under State law.

22. Since the Court has found such regulation void and unenforceable, the Court expects that the defendants will not try to enforce such regulation against the plaintiff and therefore it is unnecessary at this time to issue an injunction.

23. That the costs of this action should be taxed to the defendants.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that 474 Nebraska Administrative Code 6-005.26K 2.b. is void and unenforceable in so far as it prohibits the use of reasonable corporal punishment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this action should be and hereby are taxed to the defendants.

Dated this 6th day of December, 1985.

BY THE COURT:

/s/ Dale E. Fahrnbruch
District Judge

CORNHUSKER CHRISTIAN CHILDREN'S HOME, INC., A NEBRASKA NONPROFIT CORPORATION, APPELLEE V. DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA ET AL., APPELLANTS.

227 Neb. 94, 416 N.W.2d 551

Filed December 11, 1987. No. 86-055.

1. *Declaratory Judgments: Appeal and Error.* In an appeal from a declaratory judgment, the Supreme Court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court.

2. *Administrative Law: Minors: Public Policy.* Public policy in Nebraska does not prohibit the Department of Social Services of the State of Nebraska from enacting a regulation proscribing the use of physical punishment in licensed child-caring facilities.

3. *Minors: Words and Phrases.* A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.

4. *Administrative Law: Minors.* Neb. Rev. Stat. § 43-708 (Reissue 1984) does not provide an agency standing in loco parentis with an affirmative right to inflict corporal punishment upon children residing in licensed child-caring facilities. Section 43-708 simply limits the Department of Social Serives' power to forcibly remove a child from the home of his parents or guarddian, or one standing in loco parentis prior to State intervention into the parent-child relationship.

5. *Administrative Law: Parental Rights: Minors.* Parents' natural and superior rights to have custody of their children have always been protected and maintained by the courts, but those rights are not absolute or inalienable, as society also has a paramount interest in the protection of the rights of children to be loved, to be cared for properly, and to have proper moral training and education. The State's parens patriae power obligates it to protect the welfare and interests of the child.

6. —: —: —. The parents' natural right to the care and custody of a child is limited by the State's power to protect the health and safety of children. An agency standing in loco parentis to a parent is similarly limited by the State's parens patriae power to protect the best interests and welfare of children within its jurisdiction.

7. —: —: —. A parent has a personal right to determine the appropriate discipline to be inflicted upon the child, but the State has a paramount interest in protecting the health and welfare of a child from parental discipline decisions which may cause the child emotional or physical harm. The State has a compelling interest in the health and safety of children within the State's jurisdiction.

8. *Administrative Agencies: Statutes: Legislature.* The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute.

9. —: —: —. An administrative agency's rulemaking authority is limited to the powers delegated to the agency by the statute which the agency is to administer.

10. —: —: —. An administrative agency's rulemaking authority is essential to the agency's exercise of its power in efforts to achieve a purpose intended by the Legislature.

11. —: —: —. The validity of an administrative agency's rule or regulation is contingent upon consistency with the statute under which the rule or regulation is promulgated.

Appeal from the District Court for Lancaster County: Dale E. Fahrnbruch, Judge. Reversed.

Robert M. Spire, Attorney General, and Royce N. Harper, for appellants.

Steven G. Seglin of Crosby, Gunezel, Davis, Kessner & Kuester, for appellee.

Boslaugh, C.J., Pro Tem., White, Hastings, Caporale, Shanahan, and Grant, JJ., and Colwell, D.J., Retired.

Per Curiam.

This is an appeal from a judgment entered by the district court for Lancaster County in favor of Cornhusker Christian Children's Home, Inc. (Cornhusker), and against the Department of Social Services (DSS) of the State of Nebraska. In December 1984 Cornhusker brought a declaratory action, asserting that the DSS regulation in Neb. Admin. Code tit. 474, ch. 6, § 6-005.26K (1983) (Regulation 6-005.26K) contravenes state common and statutory law (Neb. Rev. Stat. §§ 28-1413 (Reissue 1985) and 43-708 (Reissue 1984); exceeds DSS' authority under state law (Neb. Rev. Stat. § 71-1904 (Reissue 1986); establishes an arbitrary and capricious classification between the regulation of physical punishment imposed in child-caring agencies and that of family day-care homes; and violates the Nebraska and U.S. Constitutions under the due process and equal protection clauses of U.S. Const. amend. XIV. The district court found that the public policy of the State of

Nebraska authorizes the use of corporal punishment upon children residing in child-caring facilities. The district court further found that a parent may delegate authority to administer reasonable corporal punishment and that persons in loco parentis have the authority to use reasonable corporal punishment for discipline and control of children placed in their care. The district court also found that the distinction made by DSS between child-caring facilities and family day-care homes with respect to the use of corporal punishment was arbitrary and capricious. The district court then held that the subject regulation was void and unenforceable, since it exceeded the authority and power granted to DSS under state law. DSS has appealed and requests that this court reverse the judgment of the district court, thereby upholding the regulation and the prohibition against the use of physical punishment as a proper expression of DSS' duty to promulgate rules necessary for the care and protection of children in Nebraska.

Cornhusker is a non-profit corporation licensed by the State of Nebraska as a child-caring agency to provide 24-hour residential care for children placed in the agency by parents, courts, and DSS. Timothy Loewenstein, a member of Cornhusker's board of directors, described the Cornhusker home as composed of a number of cottages under the control of various houseparents who assume the responsibility of representing the children's parents. Situated on a 160-acre ranch, each cottage consists of a large, seven-bedroom home containing kitchen and dining room facilities, a social area, and a bedroom area. Cornhusker is licensed to provide necessary care for 19 children; the home presently cares for 4 girls and 11 boys, ranging in age from 8 to 16 years. In recent months two of the chil-

dren were placed in the home by the State, and the remainder of the children were privately placed by their parents or guardians. Since Cornhusker's inception as a child-caring agency, approximately two-thirds of the children have been placed in the home by the courts.

Loewenstein also testified that Cornhusker's primary responsibility is to provide a suitable environment for the care and proper development of the children under its control. Between 1973 and 1983, an established ingredient of Cornhusker's disciplinary policy endorsed the spanking of children on the buttocks for purposes of discipline and control. The precise language of this pre-1983 disciplinary policy provided for the use of "[c]orporal punishment such as a spanking on the buttocks by the open hand or a suitable instrument for the purpose of inflicting temporary pain."

In September 1983 DSS promulgated a regulation prohibiting the use of physical punishment in child-caring agencies. The regulation is expressed in Regulation 6-005.26K:

> Discipline: Each agency shall develop written policies regarding discipline.
>
> Agency staff shall:
>
> 1. Use discipline only as a learning process in which certain specified consequences are the result of unacceptable behavior; and
>
> 2. Never use the following as discipline:
>
> a. Physical punishment or abuse;
>
> b. Denial of necessities;
>
> c. Chemical or mechanical restraints; or

d. Derogatory remarks, abusive or profane language, yelling or screaming, or threats of physical punishment.

Under Regulation 6-005.26K, physical punishment was prohibited in all child-caring facilities licensed by DSS; however, the limited use of physical punishment was allowed in family day-care homes. Under protest, Cornhusker amended its disciplinary policy to conform to Regulation 6-005.26K, which prohibited the use of physical punishment, in order to ensure that its license would be renewed as a child-caring facility.

Prior to October 1983, DSS approved of Cornhusker's disciplinary policy authorizing a houseparent to spank a child on the buttocks by applying an open hand or a suitable instrument for the purpose of inflicting temporary pain. Loewenstein testified that the former policy approving corporal punishment was applied as a last resort under controlled situations, and only after explaining to the child the reason for such an application of spanking, followed by the administration of the spanking itself. According to Loewenstein, physical punishment had the power of a deterrent, and corporal punishment was necessary to cause a child to change his behavior and conform with the standards that were expected. In the absence of corporal punishment, Cornhusker has encountered various difficulties with the children's behavior. Cornhusker's former policy of spanking children promoted the welfare of the children entrusted to Cornhusker's care. Every parent who has made a private placement of his or her child with Cornhusker has expressly granted permission or encouraged Cornhusker to apply corporal punishment when the child

disobeys the policies or rules of the home. However, Cornhusker has not used corporal punishment to effectuate its disciplinary policies subsequent to DSS' regulation proscribing physical punishment in child-caring agencies.

DSS called witnesses to testify with respect to Regulation 6-005.26K. James B. Maney was involved in the development of the current standard prohibiting the use of physical discipline in child-caring agencies. Maney acted as project manager for a DSS task force which reviewed regulations governing the licenses for group homes and child-caring agencies. Chartered in May 1978, the task force was provided with the authority to review current policy regarding the process for the issuance of licenses for group homes and child-caring agencies, and to do whatever research was necessary to provide recommendations to DSS about the revision of both the license process and the requirements. The task force's research involved the review of current disciplinary policies in child-caring agencies. Maney testified that the adoption of the corporal punishment regulation was based upon model regulations issued by the Department of Health and Human Services and by a "consortium of providers, administrators of licensing programs and various professionals in the field of child care." These regulations were to be used by State agencies as a model for their own formulation of licensing regulations. Maney noted that these model standards uniformly forbid the use of corporal punishment.

Maney testified that DSS permits spanking, with parental consent, in family day-care centers, but does not allow spanking in child-caring agencies. This family day-care regulation admonishes the day-care provider to "ob-

tain prior written permission from the parent(s) before spanking children (only the open hand on the buttocks) to prevent them from harming themselves, other persons, or property." Neb. Admin. Code tit. 474, ch. 6, § 6-001. 15B4(3) (1984). Maney defined a family day-care center as a private home providing care for a part of the day for children under the age of 12.

As an alternative method of discipline, Maney admitted that DSS approves of a child-caring agency's use of a lockup facility. Maney explained that a lockup facility is a room employed by a child-caring agency when the agency is faced with a crisis situation, including situations in which the agency seeks to limit a child's behavior. The DSS task force recommendations listed the lockup facility as an acceptable method of punishment, but recommended that "[t]he following types of punishment shall be clearly excluded: slapping, spanking, paddling, belting, and limiting basic food requirements."

Debra Dawson testified for DSS concerning her role in reviewing, revising, and developing licensing policies, procedures, and regulations. Prior to her current position, Dawson was responsible for the administration of the day-care licensing program before January 1, 1984. Dawson testified that DSS' licensing of day-care facilities includes three types of day-care homes: group day-care homes, day-care centers, and preschool facilities. Residential facilities encompass foster homes, group homes, child-caring agencies, and child-placing agencies.

Explaining the differences between residential care and day care, Dawson testified that the differentiating factor involved in residential care is the 24-hour care pro-

vided to the children. Dawson related that residential care often involves children who are placed outside of their parents' custody because of problems within the family. Dawson further testified there were a number of reasons for allowing physical punishment in family day-care homes, while proscribing physical punishment in child-caring facilities. First, children in day-care homes infrequently come from abusing families. Moreover, the children's parents visit the day-care home twice a day. Second, Dawson explained that day-care homes have small numbers of children, and a significant number of day-care providers and the children's parents believed that day-care homes should permit spanking, with certain restrictions. The primary consideration, according to Dawson, is that children within the day-care home setting are within their parents' custody; conversely, children in residential care settings are usually placed in the agency by the courts or DSS, and are not in the custody of their natural parents. Finally, child-caring facilities are group-oriented, more institutional and restrictive, and less family-like. As a result, the child-caring facility is, in Dawson's words, "very little like a family situation."

On appeal to this court, DSS asserts numerous assignments of error; however, these can be grouped into four assignments. DSS maintains that the district court erred in holding that the public policy of the State of Nebraska authorizes the use of corporal punishment upon children residing in child-caring facilities; in holding that persons who stand in loco parentis have an affirmative right to use reasonable corporal punishment, thus allowing parents to delegate to third parties the authority to administer corporal punishment; in holding that DSS exceeded its au-

thority to administer corporal punishment; in holding that DSS exceeded its authority under state law in promulgating a regulation prohibiting the use of corporal punishment upon children residing in licensed child-caring agencies; and in holding that DSS' distinction between the use of corporal punishment in child-caring facilities and family day-care homes is arbitrary and capricious. Underlying these assignments of error is DSS' position that the corporal punishment regulation is a proper expression of the State's parens patriae power to set standards for the care and protection of children within its jurisdiction.

In the present case, Cornhusker alleged, and the district court declared, that certain statutory provisions and Nebraska case law express a State public policy precluding DSS from prohibiting corporal punishment in child-caring agencies, parents may delegate to those in loco parentis the authority for corporal punishment of children, DSS exceeded its statutory power to promulgate regulations, and DSS' regulation prohibiting corporal or physical punishment is arbitrary and capricious. These are questions of law. In an appeal from a declaratory judgment, the Supreme Court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court. *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986); *OB-GYN v. Blue Cross*, 219 Neb. 199, 361 N.W.2d 550 (1985).

DSS assigns as error the district court's determination that Nebraska public policy authorizes reasonable corporal punishment in licensed child-caring agencies. The district court based its conclusion upon two sources of law

that purportedly express a public policy in favor of reasonable corporal punishment. Initially, the district court relied upon §§ 28-1413 and 43-708 as the primary statutory provisions expressing the Nebraska public policy in favor of corporal punishment.

Section 28-1413 provides in pertinent part:

> The use of force upon or toward the person of another is justified if:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:
>
> (a) Such force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
>
> (b) Such force used is not designed to cause or known to create a substantial risk of causing death, serious bodily harm, disfigurement, extreme pain or mental distress or gross degradation; or
>
> (2) The actor is a teacher or a person otherwise entrusted with the care or supervision for a special purpose of a minor and:
>
> (a) The actor believes that the force used is necessary to further such special purpose, including the maintenance of reasonable discipline in a school, class or other group, and that the use of such force is consistent with the welfare of the minor; and
>
> (b) The degree of force, if it had been used by the parent or guardian of the minor, would not be unjustifiable under subdivision (1)(b) of this section . . . .

Section 43-708, in turn, provides:

> No official, agent or representative of the Department of Social Services shall, by virtue of sections

> 43-701 to 43-709, have any right to enter any home over the objection of the occupants thereof or to take charge of any child over the objection of the parents, or either of them, or of the person standing in loco parentis or having the custody of such child. Nothing in sections 43-701 to 43-709 shall be construed as limiting the power of a parent or guardian to determind what treatment or correction shall be provided for a child or the agency or agencies to be employed for such purposes.

We respectfully disagree with the district court in its conclusion that public policy in Nebraska provides a child-caring agency with an affirmative right to apply reasonable corporal punishment. Section 28-1413 is found in chapter 28, article 14, and is a criminal defense provision of the Nebraska Criminal Code. Section 28-1413 enumerates several classes of persons, including parents, guardians, teachers, and others, who, if prosecuted for an offense involving otherwise criminal force exerted on or toward a minor, may assert a defense of justifiable force regarding that minor. Section 28-1413, however, does not contain any language which, in the area of civil law, precludes the State from regulating the use of force by these same classes of persons mentioned in the criminal statute. Accordingly, § 28-1413 does not create or confer an affirmative right to use physical or corporal punishment, but, rather, the statute only provides a defense against criminal liability. Section 28-1413 extends the defense to a "parent or guardian" when the parent or guardian is caring for or supervising a minor; nevertheless, parents do not derive their authority or affirmative right to discipline their children from this criminal defense statutory provision.

Similarly, § 43-708 cannot be interpreted as preventing DSS from regulating the disciplinary methods imposed upon children in child-caring agencies. Section 43-708 limits DSS' power to enter the home of a parent who retains the custody of a child, or the person standing in loco parentis to the child. This statute restricts DSS from forcibly removing a child from the parent, guardian, or person standing in loco parentis prior to any departmental or court-authorized intervention. Section 43-708 does not supply insulation from DSS' regulatory authority when agencies receive children from the State, parents, or courts. This interpretation is consistent with the other statutory provisions in chapter 43, article 7. For example, Neb. Rev. Stat. § 43-701 (Reissue 1984) authorizes DSS to license child-caring agencies; thus DSS "may grant or revoke such a license and make all needful rules regarding the issuance or revocation thereof." Neb. Rev. Stat. § 43-705 (Reissue 1984), moreover, provides that DSS may visit any child placed in a child-caring agency in order to ascertain whether a child is being properly cared for and living under moral surroundings. Beyond this statutory power, Neb. Rev. Stat. § 43-706 (Reissue 1984) establishes DSS' statutory authority to file a complaint in the proper juvenile court when DSS has reason to believe that any person having the care or custody of a child is an "improper person for such care or custody, or subjects such child to cruel treatment, or neglect, or immoral surroundings . . . ." Finally, Neb. Rev. Stat. § 43-707 (Reissue 1984) provides in part:

> The Department of Social Services shall have power and it shall be its duty (1) *to promote the enforcement of all laws for the protection and welfare of defective, illegitimate, dependent, neglected, and*

> *delinquent children,* except laws whose administration is expressly vested in some other state department or division hereof and to take the initiative in all matters involving such children where adequate provision therefore has not already been made; (2) *to visit and inspect all public and private institutions, agencies, societies, or persons caring for, receiving, placing out or handling children* . . . .

(Emphasis supplied.)

When §§ 43-707 and 43-708 are read together, the limiting language contained in § 43-708 pertains only to a private, family home where a parent or other person with custody of a child retains custody of the child. Consequently, when the child is placed with an agency, society, institution, or other person, DSS is authorized to oversee and regulate those agencies which place or care for these children. DSS' regulatory authority is triggered when the children are placed with the agencies which care for, receive, place out, or handle children. Section 43-708 merely reaffirms the parent or guardian's right to determine the treatment and correction of the child, or the agency to be employed for treatment and correction, prior to a possible placement by a State agency or the courts. We conclude, therefore, that the language contained in § 43-708 does not preclude DSS from enacting or enforcing a regulation prohibiting the use of physical punishment in child-caring facilities.

In light of our interpretation of § 28-1413 and 43-708, we cannot conclude that these statutes codify a public policy prohibiting DSS from promulgating a regulation which prohibits physical punishment in licensed child-caring facilities.

In *United Seeds, Inc. v. Hoyt,* 168 Neb. 527, 96 N.W.2d 404 (1959), this court was confronted with a problem in determining the State's public policy in connection with a statute relating to labeling on containers of agricultural seed sold in Nebraska. United Seeds sought a declaration that Hoyt, as director of the Department of Agriculture and Inspection of the State of Nebraska, did not have the power to prohibit United Seeds' use of labels containing the following language: " 'UNITED SEEDS, INC., warrants to the extent of the purchase price that seeds or bulbs sold are as described on the container within recognized tolerances. Seller gives no other or further warranty, expressed or implied' . . . ." *Id.* at 528, 96 N.W.2d at 405. The agriculture director claimed that his authority to restrict or prohibit seed container labels was founded on Nebraska's public policy expressed in "The Nebraska Seed Law," which provided:

> "The name and address of the person who labeled said seed or who sells, offers or exposes said seed for sale within this state. No tag or label shall be affixed to any package or container of agricultural seed or mixture thereof, unless the same has been approved by the Department of Agriculture and Inspection."

Id. at 529, 96 N.W.2d at 406.

Holding that the agriculture director did not have the authority claimed by public policy, this court, in *United Seeds, Inc. v. Hoyt, supra,* stated:

> Public policy has been defined in varying terms but a definition which has been accepted in numerous jurisdictions is as follows: "That principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. * * * The principles under which the

> freedom of contract or private dealings is restricted by law for the good of the community." Black's Law Dictionary (3d Ed.), p. 1374.
>
> It may be said with certainty that the act contains no specific declaration of public policy in this connection. Does it by reasonable inference or implication contain such a declaration? We think not.
>
> . . . There is nothing in the act or its title which specifically gives or purports to give the department any control over or voice in the rights and liabilities between a seller and purchaser of seed. Likewise there is nothing which either by inference or implication gives the department any such control. It is therefore impossible to find a source from which it could be said that there was a declaration of public policy which would permit or require the defendants to reject the declaration of limited warranty which plaintiff intended to place upon its tags or labels.

Id. at 531, 96 N.W.2d at 407.

In the present case, we find that §§ 28-1413 and 43-708 do not provide any expressed legislative indication of any public policy prohibiting DSS from regulating the use of corporal punishment in licensed child-caring facilities.

Citing *Clasen v. Pruhs,* 69 Neb. 278, 95 N.W. 640 (1903), and *Fisher v. State,* 154 Neb. 166, 47 N.W.2d 349 (1951), the district court in this case further determined that this State's public policy is reflected in the common law of Nebraska. Reliance upon those cases, however, is misplaced. *Clasen v. Pruhs, supra,* involved a suit to recover damages for the inhumane and cruel treatment suffered by a minor while in the care and custody of the minor's maternal aunt. The plaintiff alleged that she was subjected to cruel and unnecessary torture, beatings, and whippings, and improperly clothed and fed while under her

aunt's care and custody. As a result, the plaintiff maintained that she suffered permanent injuries to her health and growth. The sole issue focused upon whether or not the plaintiff was subjected to inhumane and brutal treatment in excess of the authority properly reposed in the aunt during the time the plaintiff's aunt stood in loco parentis to the child. In *Clasen* we applied the rule that "[a] parent, teacher or master is not liable either civilly or criminally for moderately correcting a child, pupil or apprentice, but it is otherwise if the correction is immoderate and unreasonable." 69 Neb. at 283, 95 N.W. at 642. Nevertheless, *Clasen* does not stand for the proposition that a teacher, master, or child-caring agency has the affirmative right to administer reasonable corporal punishment. Indeed, the rule found in *Clasen v. Pruhs, supra,* is a restatement of the common-law rule that was later codified in the criminal defense provision of § 28-1413 of the Nebraska Revised Statutes.

Similarly, *Fisher v. State, supra,* was a criminal action in which the defendant had struck and whipped a child with a wooden ruler and stick, causing the child's death. In *Fisher,* this court repeated the rule that a parent, or one standing in the relation of a parent, is not liable either civilly or criminally for moderate and reasonable corporal punishment. *Fisher v. State,* however, does not support the proposition that one standing in the relation of a parent has the affirmative right to use physical punishment upon a child. These cases are limited to factual situations involving criminal and civil liability for the excessive use of physical punishment, abuse, or neglect of a child. Thus, *Clasen v. Pruhs, supra, and Fisher v. State, supra,* fail to support the view that the common law of

Nebraska supports a clear public policy providing those who stand in the relation of a parent with the affirmative right to inflict physical punishment upon children.

We are unable to conclude that public policy in Nebraska prohibits DSS from enacting a regulation proscribing the use of physical punishment in licensed child-caring facilites. Therefore, we must conclude that the district court erred in determining that the public policy of Nebraska provides an affirmative right to a licensed child-caring facility to inflict corporal punishment.

DSS further maintains that the district court erred in holding that persons who stand in loco parentis have the right to use reasonable corporal punishment, thus allowing parents to delegate to third parties the authority to administer corporal punishment. The district court determined that those parents who have placed their children in the Cornhusker child-caring agency specifically authorized Cornhusker to administer reasonable corporal punishment. Proceeding from this factual finding, the district court determined that the houseparents and superintendent of Cornhusker stand in loco parentis to a child in the care of the Cornhusker home because the home has placed itself in the situation of a lawful parent in accordance with the principles delineated in *Austin v. Austin*, 147 Neb. 109, 22 N.W.2d 560 (1946). Citing to § 43-708, the district court concluded that Cornhusker's in loco parentis status provided it with the authority to use reasonable corporal punishment for discipline and control.

As we stated previously, § 43-708 does not provide an agency standing in loco parentis with an affirmative right to inflict corporal punishment upon children residing in

licensed child-caring facilities. Section 43-708 simply limits DSS' power to forcibly remove a child from the home of his parents or guardian, or one standing in loco parentis, prior to State intervention into the parent-child relationship. Therefore, § 43-708 cannot reasonably be interpreted as providing the child-caring gency with the affirmative right to inflict corporal punishment upon children residing in the agency. In *Austin v. Austin, supra* at 112-13, 22 N.W.2d at 563, we defined the in loco parentis relationship:

> "A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. . . ."

Although Cornhusker may stand in loco parentis to the children at the child-caring facility, the State has a legitimate interest in the proper care and protection of the children within its jurisdiction. As we stated in *State v. Duran,* 204 Neb. 546, 554, 284 N.W.2d 382, 387 (1979):

> The parents' natural and superior rights to have custody of their children have always been protected and maintained by the courts, but those rights are not absolute or inalienable, as society also has a paramount interest in the protection of the right of children to be loved, cared for properly, and to have proper moral training and education.

Hence, the State's parens patriae power obligates it to protect the welfare and interests of the child. See *Gorsuch v. Gorsuch,* 148 Neb. 122, 26 N.W.2d 598 (1947)(quot-

ing 39 Am. Jur. *Parent and Child* § 15(1942)); *State, ex rel. Bize, v. Young,* 121 Neb. 619, 237 N.W. 677 (1931).

The foregoing propositions of law demonstrate that even the parents' natural right to the care and custody of a child is limited by the state's power to protect the health and safety of children. Consequently, an agency standing in loco parentis to a parent is similarly limited by the State's parens patriae power to protect the best interests and welfare of children within its jurisdiction.

In *State ex rel. O'Sullivan v. Heart Ministries, Inc.,* 227 Kan. 244, 607 P.2d 1102 (1980), operators of a Christian children's home challenged the validity of certain state regulations and licensing requirements, contending that compliance with these regulations violated the home's rights under the "free exercise clause" in the first amendment to the U.S. Constitution. Among these regulations, the nonprofit Christian children's home objected to a regulation prohibiting the use of corporal punishment or other "[d]iscipline which is humiliating, frightening, or physically harmful." *Id.* at 249, 607 P.2d at 1106. However, the Kansas Supreme Court stated:

> The statutes and regulations to which the defendants object are all designed to protect, in one way or another, the children who are cared for in homes other than those provided by their parents. The licensing and inspection, as well as the myriad regulations, are concerned with the care and well being of the children—their shelter, health, diet, safety, education, and general welfare are of prime concern.

Id. at 253, 607 P.2d at 1108-09. Moreover, even though the children's home in *O'Sullivan, supra,* asserted a fundamental right in the first amendment context, the Kansas

Supreme Court held that the balance weighed heavily in favor of the State's power to protect children within its jurisdiction, stating that "[t]he compelling interest of the State, as *parens patriae,* is the protection of its children from hunger, cold, cruelty, neglect, degradation, and inhumanity in all its forms. To fulfill this responsibility, the legislature has elected to impose licensing and inspection requirements." *Id.* at 257, 607 P.2d at 1112.

Johnson v. Cal. State Dept. of Soc. Services, 123 Cal. App. 3d 878, 177 Cal. Rptr. 39 (1981), involved operators of a private day-care and preschool center who challenged a California Department of Social Services regulation prohibiting corporal punishment and other humiliating or frightening techniques. To obtain a license under California law, the plaintiffs were required by the Department of Social Services to state in writing that they would refrain from corporal punishment, including spanking, and would delete all references to spanking from the advertising and admission agreements.

In *Johnson,* the court stated that the plaintiffs were challenging a policy decision by the department to prohibit corporal punishment in licensed day-care centers. The plaintiffs alleged that the corporal punishment regulation violated the equal protection clause of the 14th amendment to the U.S. Constitution by establishing a suspect classification because parents of children similarly situated were subject to disparate treatment. In addition, the plaintiffs alleged that the regulation affected fundamental rights of parenting and that no compelling state interests were served by the regulation. Rejecting the plaintiffs' constitutional contentions, the court expressed:

> [W]e are here concerned with the delegation by the parents to third parties, and particularly state licensed care facilities, of the rights of discipline by corporal punishment. *We have been cited to no case which holds a State may not by regulation prohibit parents from either allowing or requiring others to administer corporal punishment to their children.* Parenting as a fundamental right is personal in nature. When parents delegate to third parties those decisions regarding child rearing, care, discipline and education, such delegation does not carry with it the constitutional protections inherent in the right of the parents. Moreover, *this parental duty and right is tempered by and subject to limitations. When parental decisions may jeopardize the health or safety of a child, the state may assert important interests in safeguarding that health and safety.*

(Emphasis supplied.) 123 Cal. App. 3d at 886, 177 Cal. Rptr. at 53 (citing *Wisconsin v. Yoder,* 406 U.S. 205, 92 S. Ct. 1526, 32 L.Ed.2d 15 (1972)).

The preceding decisions from Kansas and California demonstrate that a parent has a personal right to determine the appropriate discipline to be inflicted upon the child, but the State has a paramount interest in protecting the health and welfare of a child from parental discipline decisions which may cause the child emotional or physical harm. With great emphasis, courts have described the State's interest as a compelling interest in the health and safety of children within the State's jurisdiction. See, *State ex rel. O'Sullivan v. Heart Ministries, Inc.,* 227 Kan. 244, 607 P.2d 1102 (1980); *Johnson v. Cal. State Dept. of Soc. Services, supra; DSS v. Emmanuel Baptist,* 150 Mich. App. 254, 388 N.W.2d 326 (1986) (a regulation prohibiting corporal punishment reflected state's compelling interest in protecting young children from physical harm). In the

case before us, the district court erred in concluding that child-caring agencies, by standing in loco parentis to a parent, have the right to use reasonable corporal punishment for discipline and control. DSS' regulation prohibiting corporal punishment is a proper expression of the State's parens patriae power to set standards for the care and protection of children within Nebraska. Our determination, however, should not be construed as deprecating the parents' personal right to use reasonable corporal punishment when discipling their children.

Next, DSS contends that the district court erred in holding that the regulation prohibiting porporal punishment in licensed child-caring facilities exceeds the scope of DSS' rulemaking authority. The district court concluded that DSS' power is limited to protecting children from unreasonable corporal punishment and does not extend to matters involving corporal punishment which is otherwise reasonable. DSS argues that § 71-1904 provides the legislative authority for Regulation 6-005.26K prohibiting physical punishment in licensed child-caring facilities. Section 71-1904 provides:

> The department shall make such rules and regulations, consistent with section 71-1901 to 71-1905, as it shall deem necessary for (1) the proper care and protection of children by licensees under said sections, (2) the issuance, suspension and revocation of licenses to carry on the business of child care, and (3) the proper administration of said sections.

Cornhusker does not assert, nor did the district court hold, that § 71-1904 is an unconstitutional delegation of legislative authority to DSS. The sole question, therefore, is whether or not DSS exceeded its rulemaking authority in promulgating the corporal punishment regulation.

The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute. *County of Dodge v. Department of Health,* 218 Neb. 346, 355 N.W.2d 775 (1984). Nevertheless, the administrative agency's rulemaking authority is limited to the powers delegated to the agency by the statute which the agency is to administer. *County of Dodge v. Department of Health, supra; State ex rel. Marsh v. Nebraska St. Bd. of Agr.,* 217 Neb. 622, 350 N.W.2d 535 (1984); *Lincoln Electric System v. Terpsma,* 207 Neb. 289, 298 N.W.2d 366 (1980). An administrative agency's rulemaking authority is essential to the agency's exercise of its power in efforts to achieve a purpose intended by the Legislature. Therefore, the courts are not inclined to interfere with rules established by legislative direction when the rules bear a reasonable relation to the subject of the legislation and constitute a reasonable exercise of the powers conferred. *Lincoln Dairy Co. v. Finigan,* 170 Neb. 777, 104 N.W.2d 227 (1960); *Board of Regents v. County of Lancaster,* 154 Neb. 398, 48 N.W.2d 221 (1951). Although an administrative agency's rulemaking authority is limited to the powers delegated by the express statutory provisions, "It is almost impossible for a legislature to prescribe all the rules and regulations necessary for a specialized agency to accomplish the legislative purpose." *School Dist. No. 8 v. State Board of Education,* 176 Neb. 722, 726, 127 N.W.2d 458, 461 (1964). In *Motors Acceptance Corp. v. McLain,* 154 Neb. 354, 358, 47 N.W.2d 919, 921-22 (1951), we stated:

> "It is not always necessary that statutes and ordinances prescribe a specific rule of action. This is particularly true in those situations where it is diffi-

> cult or impracticable to declare a definite, comprehensive rule, or where the discretion to be exercised by an administrative officer relates to a regulation imposed for the protection of public morals, health, safety, and general welfare. . . . "

The validity of an administrative agency's rule or regulation is contingent upon consistency with the statute under which the rule or regulation is promulgated. *County of Dodge v. Department of Health, supra.* Referring to § 71-1904, we note that the Legislature has authorized DSS to make such rules and regulations "as it shall deem necessary for . . . the proper care and protection of children." The corporal punishment regulation falls under the purview of this general standard providing DSS with the authority to determine the necessary regulations for proper care and protection of children within Nebraska. DSS' disciplinary standard has a direct relationship to the concepts of both child-care and child protection. In each case, DSS has made a determination concerning a specific type of care and protection which, in the present case, relates to corporal punishment. DSS has not used its rulemaking power to modify, alter, or enlarge provisions of the statute which it is charged with administering. *County of Dodge v. Department of Health, supra.* Moreover, as we stated in *Motors Acceptance Corp. v. McLain, supra,* an administrative agency will have considerable discretion when its regulation relates to the protection of public morals, health, safety, and general welfare.

DSS admitted that Regulation 6-005.26K was not promulgated in response to any specific incident of child abuse at a child-caring facility. However, DSS periodically reviews regulations pertaining to child-caring facilities,

and the corporal punishment regulation was promulgated in an effort to protect children from physical or psychological harm. Although Cornhusker asserts that it has the right to inflict "reasonable" physical punishment in licensed child-caring facilities, nevertheless, we agree with DSS that a "reasonableness" determination would be ad hoc in nature and would only come after a child has already been psychologically or physically harmed. In light of these facts, we hold that Regulation 6-005.26K properly comes within DSS' rulemaking authority to promulgate rules for the proper care and protection of children in licensed child-caring facilities.

DSS' final assignment of error asserts that the district court erred in holding that DSS' distinction between the use of corporal punishment in child-caring facilities and family day-care homes is arbitrary and capricious. The district court concluded that the reason for applying reasonable corporal punishment in family day-care homes similarly and equally applied to infliction of corporal punishment in the Cornhusker home, since houseparents at Cornhusker administered the punishment, and if unreasonable force were being used, that fact would more than likely be reported to a higher authority by the other children at Cornhusker home. DSS, however, contends that there is a clear rationale behind DSS' distinction in the disciplinary standards applied in the different facilities.

As pointed out by DSS' witness Debra Dawson, children in licensed child-caring facilities, like children in foster care, often come from abusive families, while children in family day-care centers are visited by their parents at the facility at least twice a day. A major distinction

between these two types of facilities is that children in family day-care centers are generally within the custody of their own parents, while children in licensed child-caring facilities are, generally placed there by courts and DSS. Children in family day-care homes, like children in foster homes, are faced with less severe problems than are children who are placed in the more institutional and restrictive environment of a child-caring agency. Therefore, child-caring agencies are more restrictive and offer a more structured environment than a family day-care home. In summary, unlike parents in child-caring facilities, parents of children in family day-care homes are actively involved in the upbringing of their children and maintain close contact with the child-care provider.

In *Ingraham v. Wright,* 430 U.S. 651, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977), the U.S. Supreme Court analyzed the "openness" of the public school environment in holding that the use of corporal punishment in public schools did not constitute cruel and unusual punishment in violation of the eighth amendment:

> Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. *Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.*
>
> *The openness of the public school and its supervision by the community affords significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner.*

(Emphasis supplied.) 430 U.S. at 670.

DSS contends that, unlike public schools, 24-hour child-caring facilities are not open institutions. Evidence presented in this case concerning the restrictive and more institutionalized environment of the child-caring facility buttresses DSS' contention. Indeed, assuming that the majority of the children have been placed in the child-caring agency by the courts or DSS, as are two-thirds of the children in Cornhusker home, then the children do not have the support of their parents to intervene when the children may be mistreated. Moreover, child-caring agencies are not accountable to the same extent as are public schools. Finally, unlike family day-care home providers, who are often visited by the children's parents as frequently as twice a day, operators of 24-hour-a-day child-caring facilities are not accountable to the children's parents. The record does not support the district court's conclusion that a mistreated child would likely report an incident of mistreatment to a higher authority in Cornhusker home.

DSS' special concern pertaining to corporal punishment inflicted upon children in licensed child-caring facilities reflects the State's legitimate right and duty to protect and nurture its minor children. See *Prince v. Massachusetts,* 321 U.S. 158, 64 S. Ct. at 438, 88 L. Ed. 645 (1944). As the Texas Supreme Court expressed in *State v. Corpus Christi People's Baptist,* 683 S.W.2d 692, 696 (Tex. 1984):

> The State must be especially concerned with the welfare of children residing in child-care facilities. The parents of these children are absent. The children who reside in these homes are entirely dependent upon the operators and employees for their food, shelter and care. Communication with those outside the facility is wholly controlled by the institution. The staff

> at the homes exercise total supervision over the children's health, safety and well-being. They direct even the smallest details of the children's daily lives.

In *State v. Corpus Christi People's Baptist, supra,* the court held that the State has a compelling interest of the highest order in protecting children in child-care facilities from physical and mental harm and that this compelling interest outweighed the burden imposed by the church's duty to comply with licensing requirements.

Realizing that the State of Nebraska has a compelling interest in the care and protection of children in licensed child-caring facilities, we cannot conclude that DSS' proscription of physical punishment upon children in these child-caring agencies is arbitrary and capricious. DSS has demonstrated that a justifiable reason exists for the difference in treatment between children residing in licensed child-caring facilities and children in the care of providers in family day-care homes. See, also, *Johnson v. Cal. State Dept. of Soc. Services,* 123 Cal. App. 3d 878, 177 Cal. Rptr. 49 (1981) (upholding a Department of Social Services regulation prohibiting corporal punishment in licensed day-care centers, and emphasizing the differences between licensed day-care centers and public schools); *Kate' School v. Department of Health,* 94 Cal. App. 3d 606, 156 Cal. Rptr. 529 (1979) (prohibiting corporal punishment in community care facilities for mentally disabled children).

We conclude that DSS' regulation, codified in Neb. Admin. Code tit. 474, ch. 6, § 6-005.26K (1983), and prohibiting corporal or physical punishment, is a proper ex-

pression of the State's parens patriae power to set standards for the care and protection of children within the State of Nebraska. Therefore, we reverse the judgment entered by the district court in these proceedings.

Reversed.

OFFICE OF CLERK OF THE SUPREME COURT

Lincoln, NE 68509 3-16-88

IN CASE OF

CORNHUSKER CHRISTIAN CHILDREN'S HOME
V. DEPT. OF SOCIAL SERVICES, NO. 86-055

THE FOLLOWING ORDER HAVE BEEN MADE

Motior of appellee for rehearing overruled

Respectfully,

CLERK OF THE SUPREME COURT

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

CORNHUSKER CHRISTIAN CHILDRENS HOME INC., a Nebraska Nonprofit Corporation,	)	No. 86-055
APPELLEE,	)	ORDER DENYING APPELLEE'S MOTION TO CERTIFY A FEDERAL QUESTION
V.	)	
THE DEPARTMENT OF SOCIAL SERVICES, ET AL.,	)	
APPELLANTS.	)	(Filed May 10, 1988)

THIS MATTER COMES ON for hearing before the court upon the motion of the appellee for a certificate as to the existence of a federal question.

Upon consideration whereof, this court finds that although appellee, in its petition for declaratory judgment, alleged certain violations of the U.S. Constitution, and on appeal to this court, reiterated these arguments in its brief, nevertheless, in its declaratory judgment, the district court did not address any of the constitutional issues, but, rather, decided the case in favor of appellee solely on the basis of the voidness of the appellant's regulation under Nebraska statutes.

This court further finds that on appeal to this court, the errors assigned by the appellants were restricted to matters of public policy of the State of Nebraska and the invalidity of the Department of Social Services' regulations vis-a-vis the Nebraska statutes. Accordingly, this court limited its decision to such claimed errors and did

not deal with issues of Nebraska or U.S. Constitutional questions.

Furthermore, the appellee did not and could not cross-appeal on the constitutional issues for the reason that in the absence of an express finding by the district court on an issue adverse to an appellee, a cross-appeal in reference to such issue may not be had in this court. *Meyer v. First United Methodist Church*, 206 Neb. 607, 294 N.W.2d 611 (1980).

IT IS THEREFORE ORDERED that no federal question having been addressed or decided by either the trial court or this court on appeal, the appellee's motion for certification of a federal question is denied.

DATED THIS 10th day of May, 1988.

BY THE COURT

/s/ William C. Hastings
William C. Hastings, Chief Justice

IN THE SUPREME COURT OF THE
STATE OF NEBRASKA

CORNHUSKER CHRISTIAN CHILDRENS HOME, INC., A Nebraska Nonprofit Corporation,	)	No. 86-055
Appellee,	)	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, et al.,	)	
Appellants.	)	(Filed May 27, 1988)

NOTICE is hereby given that Cornhusker Christian Childrens Home, Inc., the Appellee above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Nebraska, overruling Appellee's Motion For Rehearing, entered in this action on March 16, 1988.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: May 27, 1988.

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By /s/ Steven G. Seglin
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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the above and foregoing Notice of Appeal was served upon the Appellants herein, by mailing a copy hereof to Royce N. Harper, Assistant Attorney General of the State of Nebraska, attorney of record for the Appellants, 2115 State Capitol, Lincoln, Nebraska 68509, by United States Mail, postage prepaid, on this 27th day of May, 1988. All of the parties required to be served have been served.

/s/ Steven G. Seglin
Attorney for Appellee

SELECTED PORTIONS OF SECOND AMENDED PETITION FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff states as follows:

* * *

24. Plaintiff is a person standing in loco parentis and has the custody of minor children in its care and as such vicariously assert the parents' hereinafter specified constitutional rights which will be diluted or adversely affected if the Regulation remains in force. Pursuant to the Fourteenth Amendment to the United States Constitution and Section 3, Article I of the Constitution and Section 3, Article I of the Constitution of the State of Nebraska the Plaintiff has the fundamental right of personal liberty which includes decisions on rearing, caring and education of children in its custody and to use measures for the safeguarding and promotion of the welfare of said minor children which includes the right to use reasonable force to discipline said children; and is similarly situated and has the right to be treated the same with respect to physical punishment as other agencies involved in child caring including Family Day Care Homes.

25. DSS by adopting and enforcing the Regulation and the Attorney General and the Governor by approval of the Regulation have deprived Plaintiff of its aforesaid constitutional rights (1) by establishing a suspect classification, (2) by affecting fundamental rights of parenting, and (3) no compelling state interest is served by the Regu-

lation all in violation of the Fourteenth Amendment to the United States Constitution.

* * *

RELIEF

29. WHEREFORE, Plaintiff prays the Court to enter its declaratory judgment, declaring as follows:

* * *

(c) That the adoption, approval and enforcement of the Regulation is in violation of the Fourteenth Amendment to the United States Constitution

* * *

SELECTED PORTIONS OF CORNHUSKER'S BRIEF ON MERITS

86-055

IN THE SUPREME COURT OF NEBRASKA

CORNHUSKER CHRISTIAN CHILDREN'S HOME INC., A Nebraska Nonprofit Corporation,

Appellee,

v.

THE DEPARTMENT OF SOCIAL SERVICES, et al.,

Appellants.

APPEAL FROM THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Honorable Dale E. Fahrnbruch, District Judge

BRIEF OF APPELLEE

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SELECTED PORTIONS OF CORNHUSKER'S BRIEF IN SUPPORT OF REHEARING

86-055

IN THE SUPREME COURT OF NEBRASKA
CORNHUSKER CHRISTIAN CHILDREN'S HOME INC., A Nebraska Nonprofit Corporation,

Appellee,

v.

THE DEPARTMENT OF SOCIAL SERVICES, INC.,

Appellants.

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

Honorable Dale E. Fahrnbruch, District Judge

BRIEF OF APPELLEE IN SUPPORT OF ITS MOTION FOR REHEARING

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* * *

CORNHUSKER CHRISTIAN CHILDRENS HOME POLICY ON DISCIPLINE
(in force from 1970 to 1983)

General Philosophy: Discipline is a part of the total approach in attempting to meet the needs of children placed in care. Discipline should have all the elements of instruction training and correction. The child should always be considered as an individual when determining the best approach to discipline.

A. Discipline of the child is the primary responsibility of the houseparent couple. Houseparents shall communicate any out of the ordinary disciplinary procedures to the superintendent.

B. Discipline which is firm, fair and loving will bring a sense of order into the child's life as well as teach him respect for himself and others.

C. A logical and consistent set of rules which shall be explained to the child upon admission and reaffirmed as required should be the first step in establishing a good disciplinary situation.

D. Consequences for actions requiring corrective discipline should be established in advance in every case possible in order that the child may know what is expected of him and what to expect if he fails to perform.

E. Give reasons for rules, regulations, policies or restrictions, i.e. (1) Respect for authority. (2) Health and safety. (3) Protection of right's of others. (4) Development or moral and social values. (5) Maintaining order in cottage life. (6) Development of self-discipline.

F. Corrective discipline should be fairly and consistently administered. The child should realize that the houseparent may make judgments which set aside established policies if circumstances require such.

G. Humiliation of the child should not be the intent of discipline. Care should be taken that discipline is a controlled situation which has been reasoned through rather than a reaction or the result of frustration.

Methods of Discipline:

A. Restricted:

1. Any form of corporal punishment which will inflict temporary or permanent injury is strictly forbidden.
2. Use of a locked isolation room is not allowed.
3. Any form of restraint such as tying the hand or feet shall not be used.
4. Baiting or coercing a child into a fist fight or boxing match in order to inflict physical punishment shall not be practiced.
5. Use of work as punishment is discouraged as it does not contribute to the development of a good work ethic.
6. Taking away of regular meals shall not be used as discipline.
7. Removal of allowance is not to be used as discipline.
8. Harsh or abusive language shall not be used.

B. Approved:

1. Restriction of priveleges for reasonable lengths of time.
2. Corporal punishment such as a spanking on the buttocks by the open hand or a suitable instrument for the purpose of inflicting temporary pain.
3. Restriction to bedroom for reasonable lengths of time.

4. Payment out of allowance or savings for intentional or irresponsible damage or destruction of property.
5. Physical restraint to prevent flight or resistance to the extent necessary to prevent self-inflicted harm or harm to others.
6. Physical exercise such as laps or calesthenics may be used.

Supreme Court, U.S.
FILED
OCT 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2058

In The
Supreme Court of the United States
October Term, 1987

CORNHUSKER CHRISTIAN CHILDREN'S HOME, INC., A Nebraska Nonprofit Corporation,

Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, *et al.*,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

APPELLEE'S MOTION TO DISMISS OR AFFIRM

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30 pp

QUESTIONS PRESENTED

I.

Whether Cornhusker Christian Children's Home, Inc., has standing to claim a denial of parental rights.

II.

Whether the Nebraska Supreme Court properly denied Cornhusker's motion to certify a federal question given that the constitutional issue was not addressed by the district court and was not, therefore, assigned as error by the appealing party.

III.

Whether the opinion of the Nebraska Supreme Court indicates clearly and expressly that it rests on bona fide separate state grounds.

PARTIES TO THE OPINION BELOW

Cornhusker Christian Children's Home, Inc., appellant herein, and the State of Nebraska Department of Social Services, appellee herein, are parties to the opinion of the Nebraska Supreme Court. That case is reported at 227 Neb. 94, 416 N.W.2d 551 (1987). Note that Cornhusker is the sole appellant. Other appellees herein are the Director of the Nebraska Department of Social Services, Kermit R. McMurry, formerly Gina C. Dunning; the Nebraska Attorney General, Robert A. Spire, formerly Paul A. Douglas; Governor of the State of Nebraska, Kay Orr, formerly Robert C. Kerry; and the State of Nebraska.

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JURISDICTIONAL STATEMENT

The Nebraska Department of Social Services of the State of Nebraska ("DSS"), Appellee, agrees that the Nebraska Supreme Court upheld the regulation on state law grounds. However, it is necessary to comment on one portion of that summary made by Cornhusker Christian Children's Home, Inc., ("Cornhusker"), Appellant. The statement ". . . that the regulation violated the liberty interest of the Cornhusker and of parents with children placed at Cornhusker, . . ." does not, in context, fully comport with the factual scenario for the reason that the parents of the children were at no time a party to the action.

JURISDICTION

Appellant has generally outlined the basis of the controversy, but DSS disagrees on the issue as to whether the decision presents a federal question to be reviewed by this Court, and, therefore moves, to dismiss the appeal under Rule 16(b) of Supreme Court Rules in that the judgment does not create a substantial federal question and rests on an adequate non-federal basis. *Michigan v. Long,* 463 U.S. 1032 (1983). Consequently, a dismissal for want of jurisdiction for failure to raise a substantial federal question is a dismissal on the merits. *Cross v. Bruning,* 413 F.2d 678, *cert. denied,* 396 U.S. 970, *rehearing denied,* 396 U.S. 1063 (1969). Department of Social Services also moves for dismissal under 16(d) of the Supreme Court Rules in that Cornhusker does not have standing to sue

in the United States Supreme Court. *See, e.g., Don't Bankrupt Washington Committee v. Continental Bank,* 460 U.S. 1077 (1983). Cornhusker seeks to rest its claim on the legal rights or interests of third parties and is unable to show actual or threatened injury apart from asserting third party interests. *Valley Forge College v. American United,* 454 U.S. 464 (1982).

It should be noted that the decision in the courts below was made on state law grounds. In the trial court (The District Court for Lancaster County Nebraska) where the Cornhusker first prevailed, the decision to invalidate the regulation (and thus permit corporal punishment) was based on statutory law. In other words the trial court which decided favorably for Cornhusker did not find it necessary to address the constitutional question. When the Supreme Court of Nebraska reviewed the record, the arguments, and the lower court opinion, it reversed the trial court decision which was made on state law grounds.

The trial court's rationale for invalidating the regulations was based on several considerations, none of which were based on a fundamental constitutional question. The trial court first stated that the Nebraska Legislature specifically permitted corporal punishment citing Neb.Rev. Stat. §§ 28-1413, and 43-708. It then reasoned from there that any attempt to prohibit or limit corporal punishment was a violation of statutory authority. From that threshold the trial court concluded that the Nebraska Legislature had not authorized the abolishment of reasonable corporal punishment. The trial Court then stated that since the Department did permit corporal punishment (spank-

ing) in family day care homes, the prohibiting of it in child caring agencies was arbitrary and capricious. This was in spite of the fact the record shows that the distinction was reasonable in that children in family day care centers go home each night with the parents having ongoing rapport with the staff of the home and regular opportunity to talk to and inspect their children. On the other hand, the parents of children in child caring agencies may not have an opportunity to see or visit with their children for several months.

The trial court stated that house parents and the superintendent stand *in loco parentis* to children placed in the home, and then reasoned that since a parent can use reasonable corporal punishment that employees of the home can do so as well. Cornhusker argued and the trial court stated that the position of parents and those standing *in loco parentis* are identical. In reality they are not the same, and both are subject to state intervention. A parent is not free to use corporal punishment to a level of abuse. A home or agency such as Cornhusker, as a condition of licensing, can be required to follow a regulation prohibiting corporal punishment.

The trial court also concluded that the public policy of the State of Nebraska is not to prohibit reasonable corporal punishment and that the Legislature has not authorized its abolishment. DSS fails to see how this statute can be read to restrict the Department from promulgating regulations prohibiting corporal punishment.

Both of these statements by the trial court ignored the fact that the Legislature had spoken on the subject in Neb.Rev.Stat. §§ 71-1903 to 71-1915 requiring the Depart-

ment of Social Services to promulgate rules and regulations for the protection of children in the licensure of homes. The regulation or prohibition of corporal punishment was clearly within the ambit of the statute to protect children. However, the trial court held that Regulation 6-005.26K was void since it exceeds the authority and power of the Department under State Law. This decision was reversed by the Supreme Court of Nebraska which effectively reinstated the prohibition against corporal punishment.

It should be emphasized that the trial court held for Cornhusker on the basis of statutory authority. The trial court in its opinion did not address a constitutional issue such as whether there was a violation of the rights of the home or the parents under the Fifth or the Fourteenth Amendments. The issue before the trial court was the validity of the regulation as it applied to the home as a condition of licensure. The District Court did not address the issue of possible intrusion on the parents' rights. Neither did the Nebraska Supreme Court and properly so.

The Supreme Court disagreed with the trial court, holding there was authority for the regulation under state law and held that it was valid. The fact that Cornhusker argued that the rights of the parents were in tandem with licensure requirements for home is not sufficient to create a substantial federal question. Even though the Supreme Court of Nebraska reversed the trial court, it does not mean that Cornhusker should be able to "bootstrap" a peripheral issue, to which Cornhusker did not have standing to raise, into a substantial federal question.

Moreover, Cornhusker's attempt to convert the rights or interests of parents into the claim raised on appeal is

not sufficient for standing. Regulation 6-005.26K does not injure Cornhusker's ability to control those children under its supervision since Cornhusker is relatively free to utilize most noncorporal forms of punishment. Stated simply, Cornhusker neither asserts its own legal rights nor falls within the zone of interests protected by the regulation and constitutional right of privacy.

A. Statement of the Case

DSS agrees generally with Cornhusker's statement of the case. However, it should be noted that the trial court did not address the matter of parents Fourteenth Amendment rights, and thus that issue was not addressed by the Supreme Court of Nebraska. Further, it should be noted that there were no parents who were parties to the action.

B. Facts Material to Questions Presented

Cornhusker has set out facts which in general are material to the questions presented. DSS accepts Cornhusker's outline of material facts except the last sentence which is argumentative.

THE ISSUES CONSIDERED BY THE DISTRICT COURT DO NOT RAISE A SUBSTANTIAL FEDERAL QUESTION.

The decision of the Supreme Court of Nebraska was based on the statutory authority of the Department of Social Services to promulgate regulations for the care and protection of children. Cornhusker alleges that the Nebraska Supreme Court erred in not addressing the Cornhusker's Fourteenth Amendment due process right

to a fair hearing. This allegation ignores the fact that there was a full trial in the lower court and an appellate review in the Supreme Court. The fact that the court was able to dispose of the matter on statutory grounds would not result in a denial of due process where the alleged federal question is claimed by a facility that does not have standing to assert the claim. The Cornhusker Home is not the parent of the children, and in that position cannot claim the protection that is afforded to the family under the U.S. Constitution. Even if certain parents were parties to the action, which they are not, the fact remains that when parents place their children in the custody of a home or institution on a full time basis, the standard of state interest has changed. Thus, the state's interest in the protection of children must take precedence over an allegation of parental rights by an institution, which although possessed of some parental prerogatives by reason of the doctrine in *loco parentis,* is not in fact, the parent of the children. Thus, when the trial court and the Nebraska Supreme Court considered the validity of the regulation from the standpoint of statutory authority, and after a hearing on all the salient facts, decided on that issue, the Nebraska Supreme Court is not required to address unsubstantial federal claims. To refuse to do so is not a violation of the supremacy clause under Article VI of the United States Constitution nor is it a denial of the Fourteenth Amendment due process right to a fair hearing.

Cornhusker claims a protected parental liberty interest under the Fourteenth Amendment to the Constitution and alleges the questions are substantial. As stated above, the parents are not parties to the action and even if they were, they have, by placing the child in an institution,

given up certain parental rights are inherent in the traditional family situation. Further Cornhusker alleges a substantial independent claim to a liberty interest in its own right as a child caring agency. DSS submits that a prohibition of corporal punishment as a requirement for licensure, voluntarily entered into on a contractual basis, cannot be considered an intrusion sufficient to rise to a violation of the Fourteenth Amendment.

———o———

ARGUMENT

I.

CORNHUSKER, A CHILD CARING AGENCY, THE SOLE PLAINTIFF IN THIS ACTION DOES NOT HAVE STANDING TO CLAIM A DENIAL OF PARENTAL RIGHTS, INASMUCH AS STATE LICENSED CARE FACILITIES WHICH OFFER PUBLIC SERVICE, POSSESS NO CONSTITUTIONAL RIGHT OF PRIVACY.

None of the parents with children in the Cornhusker Home are plaintiffs in this action. Yet Cornhusker claims a protected parental liberty interest under the Fourteenth Amendment to the United States Constitution.

In its brief Cornhusker has equated the rights of parents with the rights of the operators of a home such as Cornhusker. The appellant cited *Smith v. Organization of Foster Families,* 431 U.S. 816, 839 (1977) for the proposition that a child caring agency such as Cornhusker through its house parents and the children in its care has the form and content as a healthy biological parent-child relationship. (See p.17 of Appellant's Brief). Even so *Foster*

Families, supra, considered but left unanswered whether a foster family is sufficiently akin to a natural family, to create a liberty interest triggering procedural due process before removal of a foster child from a foster home.

There is disagreement among courts and commentators as to whether parenting is itself a fundamental right. *Compare Baker v. Owen,* 395 F.Supp. 294 (M.D.N.C.) *aff'd,* 423 U.S. 907 (1975) *with Glaser v. Marietta,* 351 F.Supp. 555 (W.D.Pa. 1972). The United States Supreme Court has, however, recognized privacy as a fundamental right emanating from the penumbras of the constitution. One of the first privacy interests recognized by the Supreme Court was that of parents to raise and educate their children. *Meyer v. Nebraska,* 262 U.S. 390 (1923). In that case the Court declared that liberty included "the right of the individual to marry, establish a home, and bring up children." *Id.* at 399.

This raises the question as to whether the constitutional protection parents derive from the rights of privacy doctrine may be transferred to third parties. Notwithstanding deposition testimony to the contrary, representatives of Cornhusker testified at trial that during the past seven years, every parent placing a child with Cornhusker Christian Home has granted the home permission to use corporal punishment. Cornhusker's assertion overlooks a fundamental distinction. Although parents may delegate to third parties the power to make some child rearing decisions, such delegation does not carry with it that degree of constitutional protection which parents themselves enjoy.

In a case similar to the one at bar, operators of a private day care and preschool center challenged the con-

stitutionality of a California State Department of Social Services regulation which prohibited the use of corporal punishment in licensed day-care centers. *Johnson v. California State Department of Social Services,* 123 Cal.App. 3d 878, 177 Cal.Rptr. 49 (1981). The regulation, as set forth in § 31-239 of Title 22 of California's Administrative Code was as follows:

> (d) Discipline. Constructive methods must be used for maintaining group control and handling individual behavior.
>
> Corporal punishment and other humiliating or frightening techniques are prohibited.
>
> Punishment must not be associated with food, rest, isolation for illness or toilet training.

In an effort to obtain declaratory relief, the operators of the day-care center "vicariously assert[ed] the parents' alleged constitutional right to permit corporal punishment." 177 Cal.Rptr. at 37. The Court of Appeals, in upholding the constitutionality of the regulation stated:

> [W]e are here concerned with the delegation by the parents to third parties, and particularly state licensed care facilities of the rights of discipline by corporal punishment. We have been cited to no case which holds a State may not *by regulation* prohibit parents from either allowing or requiring others to administer corporal punishment to their children. *Parenting as a fundamental right is personal in nature.*

Id. at 53 (Emphasis added.)

The Court's analysis in *Johnson* is clear. Whatever protection parents derive from the right to privacy, may not be extended outside of the home to third parties.

State licensed care facilities possess no constitutional right of privacy, but rather, hold themselves out to provide a public service. Not only does the state have the power to oversee that children residing in state licensed care facilities are being properly cared for, but it has a duty to do so. DSS submits that in view of the above it is clear that a facility such as Cornhusker is not in the same position of parents and cannot therefore claim the same protected parental liberty interest.

This Court addressed the issue of standing in *Valley Forge College v. Americans United,* 454 U.S. 464 (1982), and commented on both the Article III requirements and prudential considerations. Based on that analysis of what Article III requires, for standing, one must show (1) that he has suffered actual or threatened injury, (2) that the injury can be traced to this action and, (3) that the injury is likely to be redressed by a favorable decision. *Id.* at 472. Cornhusker is unable to show actual or threatened injury apart from asserting the parents interests.

With respect to the prudential considerations, this Court has similarly stated that "the plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* at 474. Here the arguments of Cornhusker have a tenor of "speaking for the parents" when in fact it does not, and cannot because no parents are a party in interest. Furthermore, in *Valley Forge,* this Court required that the party's complaint must fall within the zone of interest to be protected by the law in question. *Id.* at 474. As Cornhusker argues for itself as a child caring agency, it must face the fact that a licensed agency does not inherit the same protection parents derive from the right of privacy.

In its brief on page 18 appellant alleges that the relationship between Cornhusker through its house parents and the children in its care has the same form and content as a healthy parent-child relationship. Cornhusker supports this proposition by citing *Smith v. Organization of* foster family. Cornhusker did not detail the holding of the case or supporting rationale. The District Court had avoided the question of whether the foster home is entitled to the same constitutional deference as the biological family, but this Court found that the challenged procedures (by involved foster parents and a foster parents organization) are constitutionally adequate even were it to be assumed that appellees (foster parents) have a protected "liberty interest." DSS submits that if foster families do not reach the threshold of a protected liberty interest, then it would certainly follow that a child caring agency does not reach that level. Foster families, as a general rule, are made up of a husband and wife, their children, and the foster child or children. There is usually a single family unit in a single family dwelling, and the husband and wife, to some degree act as substitute parents. However, in the child caring agency there are on the average twenty children who are supervised by staff so there cannot be the family atmosphere of the typical foster parent-child situation. It should be noted that there is no numerical limitation on how many children can be placed in a child care agency. Since this Court has not stated that a foster family has a protected parental liberty interest, DSS submits that logic would dictate that a child caring agency cannot be granted such protection because such an agency is even further removed from the true biological family situation than is, even the foster family.

Cornhusker cited several cases where this Court has considered a protected liberty interest in family relationships. In *Wisconsin v. Yoder,* 406 U.S. 205, 231-33 (1972) this Court held that the First and Fourteenth Amendments prevent the State from compelling parents of Amish children to attend formal high school to age 16. DSS does not believe that the right of Amish parents to decide on the course of education of their children under the First and Fourteenth Amendments is comparable to or determinative of the issue in this case, that is the right of the state to limit corporal punishment in a licensed home. Other cases cited by Cornhusker (See p.17 of brief) reiterate various protected fundamental rights, that is, the right to marry, the right to have children, the raising and educating of children, and living with relatives. DSS emphasizes that each of these cases address the rights of parents or of individuals in the family relationship and do not extend to substitute or surrogate parents or to child caring facilities.

Cornhusker claims that it has standing in this case to speak for the parent even though the parents are not party to the action. Several of the cases cited by Cornhusker are distinguishable from the case at bar. Cornhusker cites the *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974) which was a case where public school teachers challenged a mandatory maternity leave policy of five months before delivery of the child and three months afterwards. It was held that the rule was arbitrary and violative of due process because the rules create a conclusive presumption of incapability during the five months and the three month period. *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944), held unconstitutional a state statute

which prohibited a minor (boy under 12 or girl under 18) from selling literature on the street or in public places. An aunt and custodian were charged with violation of the act for directing the child in the selling of religious oriented literature. It was held that the power of the state to control conduct of children is broader than its power over adults. It further held the statute not violative of freedom of religion nor denial of equal protection under the Fourteenth Amendment. *Pierce v. Society of Sisters,* 268 U.S. 510 (1925), held unconstitutional an Oregon statute to require all children to have instruction by public school teachers, thus prohibiting children from attending parochial schools. In *Meyer v. Nebraska,* 262 U.S. 390 (1923), the State of Nebraska passed a statute which prohibited the teaching of any language other than English in the Nebraska schools. Other than restating that parents do have fundamental rights and are protected under the Fourteenth Amendment, DSS fails to see how those cases are determinative in any way in the instant case. Considered together those cases illustrate the legitimacy of state interest as well as to show the freedom of personal choice in family matters.

Pierce v. Society of Sisters, supra, is emphasized by Cornhusker to support its position that it can claim the Fourteenth Amendment rights of the natural parents. Essentially Cornhusker argues that it has standing to complain of the rule of DSS and its effect on the rights of the parents to care and discipline their children. Cornhusker alleges that it has standing to assert the concomitant rights of third parties who would be affected should the constitutional challenge fail. In *Pierce v. Society of Sisters, supra,* this Court did state that Society of Sisters could

assert the liberty interest of parents which the Fourteenth Amendment guarantees. However, it is necessary to note that the facts and issues in that case were clearly distinguishable from the case at bar. In the first place, the courts of the State of Oregon had not considered the constitutionality of the act. Secondly, the failure to address the issue would have required all students to attend public schools and would have effectively destroyed the Oregon system of private schools. In this case the Supreme Court of Nebraska has ruled on the matter and has made a decision based on independent and separate state grounds. In the instant case there was no such impact on an entire system. Rather, the evidence shows that only one facility is directly affected as this is not a class action and there are no parents joined in the action as plaintiffs.

Cornhusker cited *Craig v. Boren,* 429 U.S. 190, 195 (1976), in support of its theory that it can claim the rights of the parents. Cornhusker quoted from *Craig v. Boren* in its brief, when it stated that it is "entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [the] constitutionality fail . . ." That quote from *Boren* should be examined in terms of its factual basis. In *Boren,* Craig, a male then under 21 years and Whitner, a license vendor of 3.2 beer, brought an action for declaratory and injunctive relief, claiming that an Oklahoma statutory scheme prohibiting the sale of nonintoxicating 3.2 beer to males under the age of 21 and to females under the age of 18 constituted gender based discrimination that denied males 18 to 21 of equal protection. In holding that the statute resulted in discrimination this Court addressed the standing of Whitner, the vendor, to advocate rights of third parties seeking to ac-

cess the market. This Court held that the vendor did have standing. However, it should be noted that *Boren* is distinguishable from the case at bar. Craig was a plaintiff when the action was brought, but the case was mooted when he turned 21, which was after this Court had noted probable jurisdiction. Craig, the minor and Whitner, the vendor were joint plaintiffs. The Court apparently reasoned that one should be able to continue to speak for the other since the case was at issue.

The cases cited by the Cornhusker to support standing are cases of extreme or unique situations. *Sisters,* involved the existence of the Oregon private school system. In *Boren, supra,* the vendor retained standing for the rights of the minor customer who had turned 21 and as a result had an interest that was moot. DSS submits that language from *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965) is appropriate to the issues in this case. Although in *Griswold* this Court held that a planned parenthood physician charged under a criminal statute had standing to assert the rights of married couples, it commented on and distinguished *Tileston v. Ulman,* 318 U.S. 44 (1943), which, DSS submits, is applicable to this case.

> *Tileston v. Ulman,* . . . is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought the requirements should be strict, lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be a crime.

Tiletson v. Ulman, supra, like the instant case was an action for declaratory relief and or an injunction against a statute prohibiting giving advice on contraception. This Court stated:

> . . . his patients are not parties to the proceedings and there is no basis on which we can say that he has standing to secure on adjudication of his patients constitutional right to life which they do not assert in their own behalf. (at 45).

In *Baker v. Owen, supra,* a District Court attempted to square *Meyer* and *Pierce* upon rejecting the claim that the parental right to discipline is fundamental: "In each case the parental right prevailed not because the Court termed it fundamental and the state's interest uncompelling, but because the Court considered the state's action to be arbitrary, without reasonable relation to an end and legitimately within its power." *Id.* at 299. DSS submits that the purpose of the regulation in question, which prohibits corporal punishment in the child care facility, serves a legitimate state purpose. Where child abuse in this country has reached epic proportions and numerous children placed in such facilities are themselves victims of physical abuse, exposure to an environment of corporal punishment reinforces the negative influence from which these children seek to escape. In light of these factors it is obvious that the state is *compelled* to take the necessary action to protect the physical and emotional well-being of children placed in child care facilities.

In view of the above, DSS submits that Cornhusker should not be permitted to attach its claim for protection of an alleged fundamental right on to the existing pro-

tected liberty interest of parents. Cornhusker has attempted to use a two-tier technique to "boot strap" its position as a child caring agency to the level of biological parents in the area of fundamental rights. Bringing its argument down to its basic rationale Cornhusker is stating: (1) that the liberty interest in family relationship is not determined solely by biological blood relationship and therefore, (2) that the protected rights of parents can be transferred to foster parents or to an even less familial environment such as a child caring agency. The Department of Social Services submits that logic would militate against such rationale.

II.

THE SUPREME COURT OF NEBRASKA ACTED PROPERLY IN DENYING CORNHUSKER'S MOTION TO CERTIFY A FEDERAL QUESTION SINCE THE CONSTITUTIONAL ISSUE WAS NOT ADDRESSED BY THE DISTRICT COURT AND WAS NOT THEREFORE, ASSIGNED AS ERROR BY THE APPEALING PARTY.

It is basic that an appellate court need not reach a decision on all errors assigned by the appealing party. The appellate court then certainly cannot address issues that were not reached by the lower court since particular issues were dispositive of the case. The appellate court cannot enlarge the scope of the trial courts findings.

DSS reiterates the statement made by the Supreme Court of Nebraska in its denial of certification of a federal question that Cornhusker did not cross appeal and could not cross appeal because the trial court did not have a specific finding adverse to Cornhusker. *Meyer v. First*

United Methodist Church, 206 Neb. 607, 294 N.W.2d 611 (1980).

Here the Supreme Court of Nebraska acted properly in addressing those issues brought by DSS in its assignments of error. The function of assignments of error is to set out issues presented on appeal. They serve to advise the appellee of questions submitted for determination in order that appellee may know what contentions must be met. *Coyle v. Janssen,* 212 Neb. 785, 326 N.W.2d 44 (1982); *Cooks v. Lowe,* 180 Neb. 39, 141 N.W.2d 430 (1966). Consideration of a case on appeal is limted to errors assigned and discussed. Supreme Court Rules, Rules of Procedure, Rule 9, subd. D(1)d. *State ex rel., Hilt Truck Line v. Jansen,* 218 Neb. 591, 357 N.W.2d 455 (1984). *Lincoln County Sheriff's Employees Assn., Local 546, International Brotherhood of Police Officers v. County of Lincoln,* 216 Neb. 274, 343 N.W.2d 735 (1984).

In the appeal from the trial court to the Supreme Court of Nebraska in the case at bar there were no assigned errors involving constitutional questions because the District Court had not decided the case on constitutional issues.

It is the general and well established rule that ordinances and statutes are presumed to be constitutional and that their unconstitutionality must be clearly established. *State of Nebraska v. John L. Chistin,* 209 Neb. 174, 306 N.W.2d 86 (1981). Courts will not pass on questions of constitutionality unless it becomes necessary to do so. *State of Nebraska, Appellee v. Fred T. Wenzel,* 215 Neb. 395, 338 N.W.2d 772 (1983); *Laverty v. Cochran,* 132 Neb. 118, 271 N.W. 354 (1936).

DSS submits that the Supreme Court of Nebraska was obligated to only address those errors which were assigned on appeal. The opinion of the court indicates that each was addressed. The Supreme Court of Nebraska did not have a duty to go beyond the scope of the opinion of the trial court, which did not address the constitutional issues.

III.

JURISDICTION DOES NOT REST WITH THE SUPREME COURT OF THE UNITED STATES SINCE THE OPINION OF THE SUPREME COURT OF NEBRASKA INDICATES CLEARLY AND EXPRESSLY THAT IT IS BASED ON BONA FIDE SEPARATE STATE GROUNDS.

The United States Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds. *Michigan v. Long,* 463 U.S. 1032 (1983); *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). In *Michigan v. Long,* this Court held that it had jurisdiction against the assertion that the decision below rested on adequate and independent state grounds. This Court held that if the state-court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, independent state grounds this Court will not undertake to review the decision. *See also, Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931); *William v. Kaiser,* 323 U.S. 471 (1945).

A review of the opinion of the Supreme Court of Nebraska clearly shows that the decision was based on separate, adequate, independent state grounds. The opinion basically held that there was authority for the regulation prohibiting corporal punishment and that the regulation

was valid. A review of the opinion shows that the Supreme Court of Nebraska addressed all of the substantial issues addressed by the trial court. The appellate court disagreed with the trial court that public policy in Nebraska provided a child caring agency with an affirmative right to apply reasonable corporal punishment. The Court explained that Neb.Rev.Stat. § 28-1413 is a criminal defense provision of the Nebraska Criminal Code and does not create or confer an affirmative right to use corporal punishment. Further, the Court considered Neb.Rev.Stat. § 43-708 (Reissue 1984) which was cited by Cornhusker and explained that the statute restricted DSS from forcibly removing a child from the parent, guardian, or a person standing *in loco parentis* prior to any departmental or court authorized intervention but that it was not a basis for prohibition against corporal punishment. The Court also found that §§ 43-701 and 43-705,706 (Reissue 1984) which grant authority to the Department of Social Services to issue licenses and to investigate violations are compatible with the public policy of Nebraska. Neb.Rev.Stat. § 71-1904 (Reissue 1986) provides that the Department of Social Services shall make rules necessary for the care and protection of children was considered by the court. As to the authority of Department of Social Services to make such rules and regulations, the Court held that the Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of statute. Thus, the Nebraska Supreme Court held that regulation 6-005.26K properly comes within Department of Social Services' rule-making authority to promulgate rules for the proper care and protection of children. The Court also held that it was not arbitrary

and capricious for Department of Social Services to prohibit corporal punishment in child caring agencies but to permit it in family day-care homes. This decision was reached after considering the various differences in the two environments. Children in foster care often come from abusive families while children in day-care centers are visited by their parents. Children in child caring agencies do not have this regular contact with their parents. Thus, the court found a rational basis for the disparity in the requirements.

Certainly the opinion of the Nebraska Supreme Court clearly and expressly set out the basis of its consideration and thus showed that it was based on separate and independent state grounds. In *Michigan v. Long, supra,* this Court reiterated the necessity of a "plain statement" that a decision rests upon adequate and independent state grounds. *Id.* at 1042. DSS submits that the opinion of the Nebraska Supreme Court in this case clearly provides that plain statement.

It is the position of the DSS that this Court will not take jurisdiction where it can determine whether the asserted non-federal ground independently and adequately supports the judgment. *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931); *William v. Kaiser,* 323 U.S. 471 (1945).

In *Michigan v. Long, supra* at 1213, this Court considered the problems of reviewing state decisions from the standpoint of accepting jurisdiction and clarified the standard of review.

> The process of examining state law is unsatisfactory because it requires us to interpret state laws

> with which we are generally unfamiliar, and which often, as in this case, have not been discussed by the parties. Vacation and continuance for clarification have also been unsatisfactory both because of the delay and decrease in efficiency of judicial administration.
>
> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been cornerstones of this courts refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds we, of course will not undertake to review the decisions.

Id. supra at 1213.

The opinion of the Supreme Court of Nebraska clearly fulfills the requirement of a "plain statement" in that it expressly and clearly describes the state grounds on which it was based. It is in no way obscure or ambiguous. It addressed each and all of the issues that were addressed by the lower court, and each and all of the errors that were assigned by DSS in its appeal.

———o———

CONCLUSION

In view of the above this Court should not take jurisdiction of this appeal. DSS requests that the appeal be dismissed or affirmed under Rule 16(b) and (d) of the Rules of the United States Supreme Court.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1987

CORNHUSKER CHRISTIAN CHILDRENS HOME, INC.,
A Nebraska Nonprofit Corporation,

Appellant,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEBRASKA, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEBRASKA

REPLY BRIEF

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STATE REGULATIONS:

Neb. Admin. Code tit. 474, ch. 6 § 6-005.26K (1983) 1

I.

CORNHUSKER'S FORCED COMPLIANCE WITH REGULATION 6-005.26K IS A COGNIZABLE, PERSONAL INJURY TO CORNHUSKER THAT GIVES IT STANDING TO SEEK RESOLUTION OF ITS DISPOSITIVE FEDERAL CLAIMS IN ITS OWN RIGHT AND TO RAISE THE CONCOMMITANT INJURY CAUSED TO NATURAL PARENTS WHO PLACED CHILDREN WITH CORNHUSKER

The substantive constitutional questions in this appeal center on the infringement by the Nebraska Department of Social Services (DSS) of the rights of both Cornhusker and natural parents to discipline children. Cornhusker has complied with Regulation 6-005.26K expressly and only to avoid license revocation. It brought this lawsuit to avoid continued compliance.

Cornhusker's injury thus is actual, continuing, and a direct consequence of the "putatively illegal" regulation adopted by the DSS. *Warth v. Seldin,* 422 U.S. 490 (1975). Article III standing requires no more. *Id.*

Regulation 6-005.2K, moreover, is directed at and acts directly on Cornhusker. Since Cornhusker's injury is to its own legal and constitutional rights and is more than a general grievance, federal court prudential justiciability concerns similarly are met. *Id.*

As this Court repeatedly has held, standing is and must be determined without regard to the merits of the substantive claim under dispute. *Id.* at 500. Respondent nonetheless misperceives not only the merits of Cornhusker's constitutional claim but, more to the point here, this Court's clear articulation of the components of standing. Respondent first concludes that Cornhusker has no fourteenth amendment liberty interest—a conclusion that can be reached only by evaluating the substantive merits of Cornhusker's claim—and then argues back to a conclusion that Cornhusker lacks standing to raise any such claim. This misconception of standing permeates and infects Respondent's entire argument on this point. It also is an ex-

trapolation of why the Nebraska Supreme Court refused review that directly flouts the reasons given by the court itself. Nebraska Supreme Court Order Denying Appellee's Motion to Certify a Federal Question (Juris. Statement, App. 39).

Since Cornhusker has standing in its own right to challenge the constitutionality of the DSS regulation, it also has standing to raise "those concomitant rights" of natural parents placing children with Cornhusker—parental rights that would be "diluted or adversely affected" should Cornhusker's challenge fail. *Craig v. Boren,* 429 U.S. 190 (1976) (seller asserting rights of minor precluded from buying beer); *Griswold v. Connecticut,* 381 U.S. 479 (1974) (doctor and others asserting rights of married couples). *See Truax v. Raich,* 239 U.S. 33 (1915) (employee asserting employer's rights); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925) (private school asserting rights of parents and pupils). In any event, restrictions on a litigant's right in federal court to raise the interests of third parties are prudential, not mandated by Article III. *E.g., Barrows v. Jackson,* 346 U.S. 249 (1953). By contrast to a decision of non-justiciability in a case begun in a federal district court (where dismissal of the lawsuit is the result), this Court's decision of non-justiciability of a state court decision on a federal question leaves that state court judgment intact and unreviewable. *Doremus v. Board of Education,* 342 U.S. 429, 435 (1951). In Cornhusker's case, failure of this Court to review leaves intact the Nebraska Supreme Court's decision of regulation validity and commits Cornhusker to continued compliance with a regulation "putatively illegal" under the fourteenth amendment. Similarly, failure of this Court to review leaves a regulation in force that overrides a natural parent's informed parenting choices, choices that this Court repeatedly has held are protected by the fourteenth amendment. *E.g., Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).

Respondent's misconception of standing requirements is matched by its failure to understand the legal parame-

ters of the law governing independent and adequate state grounds. According to Respondent, when state and federal grounds both are raised but a state court decides a question exclusively on a state ground, then without further inquiry the United States Supreme Court automatically is excluded from considering the federal ground. Respondent's version of independent and adequate state grounds divests this Court of jurisdiction to hear a federal claim whenever a state court refuses to entertain that claim no matter what impact that refusal has on the exercise of the federal right. What Respondent fails to understand is that a ground cannot be independent and adequate if its very resolution is alleged to offend an interest protected by federal law.

In this case Cornhusker at trial and on appeal raised two grounds for relief. The first ground was that under state law the DSS regulation was invalid. The second ground was that, if valid under state law, the regulation was unconstitutional under the fourteenth amendment. As the Nebraska Supreme Court itself noted, Cornhusker properly raised and preserved these federal constitutional claims. Nebraska Supreme Court Order Denying Appellee's Motion to Certify a Federal Question (Juris. Statement, App. 39). Nor does Respondent now allege that somehow, somewhere Cornhusker procedurally did something wrong. There thus is neither allegation nor showing of procedural default on the record before this Court. In the absence of any such default the refusal of the Nebraska Supreme Court to resolve the dispositive federal constitutional ground (after resolving the state ground against Cornhusker) offends both Cornhusker's right to due process of law and the Supremacy Clause.

The impact on Cornhusker is dramatic. In denying Cornhusker's motion for rehearing the Nebraska Supreme Court entered judgment for the DSS. Once the mandate issued the decision became final. Under Nebraska law, the Nebraska Supreme Court now has no power to amend the mandate. *State Bank v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929). Without redress by this Court, Cornhusker

loses on the merits of its fourteenth amendment claims properly raised and preserved without any court ever once considering the merits of the claims.

What remains to a litigant situated such as Cornhusker are options either unavailable or, if available, so burdensome that they offend either the due process clause or Supremacy Clause of the Constitution of the United States. An evaluation of the consequences of Nebraska procedure makes this clear.

1. Cornhusker may not bring a second lawsuit to raise anew its federal constitutional claims because it is barred by the decision in this case even though the merits of its federal claims never were considered. Nor could Cornhusker in the first instance have resolved the problem now facing it by separating out the state and federal claims in two lawsuits. Nebraska law requires that all claims arising out of the same fact transactions be joined in one action. *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W. 2d 678 (1976); *Knapp v. City of Omaha*, 172 Neb. 78, 108 N.W. 2d 419 (1961). Thus under Nebraska law failure to raise the federal claim would have had a preclusive effect on Cornhusker's ever bringing the claim and actually bringing the federal claim has the same preclusive effect.

2. Even if Nebraska law permitted Cornhusker to bring a second lawsuit to raise its federal ground after appeal to a Nebraska Supreme Court that reviewed only the state ground, surely there is an unconstitutional burden on the exercise of a federal right when state procedure routinely requires the expense and delay of two trials before an alternative federal ground is considered and resolved. In cases such as Cornhusker's, where the resolution of the federal right is contingent on the resolution of the state right, it necessarily is the federal right that is relegated to the second trial. In cases where alternative state and federal grounds independently are raised in support of a decision, a state court not surprisingly will consider first the state ground. Again, then, it is the federal right that is relegated to the second trial.

3. If the Nebraska Supreme Court had treated Cornhusker's federal constitutional claim as cognizable but remanded for the trial judge first to entertain it, then Cornhusker contends that such action violates due process and under the Supremacy Clause is an undue burden on the exercise of a federal right. *See, e.g., Reece v. Georgia,* 350 U.S. 85 (1955) (due process violation in state procedure); *Staub v. Baxley,* 355 U.S. 313, 319-20 (1958) (application of state rule leads to "arid ritual of meaningless form"); *Wright v. Georgia,* 373 U.S. 284 (1963) (state may not require redundant repetition of point already made clear). Cornhusker recognizes that the United States Supreme Court frequently remands to afford a lower court an opportunity first to consider even a pure question of law. There are significant differences between the consequences of such docket management by this Court and that of the Nebraska Supreme Court, however.

First, the Nebraska appellate procedure unduly burdens the exercise of a federal right because, as described above, the rule impacts disproportionately on the exercise of that right: it is the federal ground that always will be relegated to consideration only on remand and it is the litigant claiming under the federal right who always will be put to the choice of paying twice to get a claim heard once. Second, since most, now all, of this Court's docket is discretionary, a remand often means that this Court need never resolve the question originally put before it. This Court thus may assure that a litigant obtains court review in an appellate court while at the same time absolutely freeing its docket to decide other pressing issues of national concern.

The Nebraska Supreme Court, by contrast, has a mandatory jurisdiction over all appeals. If it remands a case for a court (trial, not appellate) to consider a pure question of law, it can never foreclose litigants from returning that case to the Nebraska Supreme Court. The remand either will not result in avoidance of the legal question by the court or will so result most likely only because a litigant cannot afford a second appeal.

In the first situation (where the case returns on re-appeal) the Nebraska Supreme Court's remand of a pure legal question (over which it must exercise independent judgment on appeal) offends due process protections because it puts litigants to significant additional expense and delay only to achieve a trial decision with no controlling weight on the Nebraska Supreme Court once the case returns to it. A remand by the Nebraska Supreme Court simply defers a decision on the merits for a later decision when the case returns on re-appeal. The decision deferred, moreover, is deferred from a time when the record and allegations before the court are fresh to a time on re-appeal when the court will have to refamiliarize itself with the record and arguments in the case. While Cornhusker recognizes that this Court is not concerned with a state supreme court's election to cause itself duplicative work and increased time devoted to resolving issues on appeal, Cornhusker urges that this Court should be concerned when the procedure undoubtedly puts heavy costs and delay on litigants with no effective efficiency returns achieved on the other side of the ledger.

In the second situation (where the losing litigant cannot afford a re-appeal), the Nebraska Supreme Court does avoid the obligation of review. It does so, however, through an appellate procedure so time-consuming and costly as to exclude some litigants from being able to fully and fairly air their claims. When entry to effective appellate review is a ticket many cannot afford, then a state appellate procedure must show more systemic benefit than can Nebraska's if it is to withstand a due process challenge grounded in the denial of effective access to the courts.

A case such as Cornhusker's shows in stark terms the burden imposed by Nebraska appellate procedure. Cornhusker is a nonprofit charitable corporation deriving the bulk of its operating funds from private contributions. By contrast, Respondent State of Nebraska can afford to litigate the case forever. The State of Nebraska through its courts thus establishes an appellate procedure that im-

pacts heavily on the poor—and on virtually anyone who sues the State of Nebraska for injury it allegedly caused.

As applied to the Cornhusker appeal, moreover, a remand for trial judge determination of a pure legal question is particularly eggregious as it means a duplicative and costly second trial to resolve the federal claim. The judge who heard the original trial involving Cornhusker and DSS is now a judge of the Nebraska Supreme Court. A remand in this case necessarily must be entertained by a different judge. There is no statute or rule in Nebraska that permits a trial judge on remand to decide a case de novo on a record established at a trial over which he did not preside. Nor could Cornhusker find a reported case in which a trial court exercised such authority. Even if the authority existed, the one benefit accruing to an appellate court—a remand to a judge familiar with the case who heard the evidence first-hand and had the opportunity to evaluate witness credibility—is gone. A Nebraska Supreme Court that already has read and considered the appellate record and arguments of counsel is in a much better position to decide than is a trial judge who has now to familiarize himself with the case for the first time. As applied in the particular circumstances, then, a remand by the Nebraska Supreme Court offends due process and unduly burdens Cornhusker's exercise of its rights under the Supremacy Clause.

The refusal of the Nebraska Supreme Court to consider Cornhusker's dispositive federal claim is a remarkable but routine appellate practice by that court. The entry of judgment by that court without even a remand—however burdensome that remand—also is remarkable and, at least until September 23, 1988, was routine appellate practice by that court.

In preparing to meet a potential procedural default argument never made by Respondent, Cornhusker attempted to uncover any existing Nebraska law on remands by the Nebraska Supreme Court to a trial court for consideration of pure legal questions not considered originally by the trial court but dispositive once the Nebraska Su-

preme Court reversed on other grounds. The Westlaw database for Nebraska cases was checked through 1944 (the last date for which Nebraska cases are included in the database). The database involved more than 2800 cases (not including those cases remanded for computation of interest on judgments); every case using the word "remand" was pulled up and reviewed. All but 15 cases involved a remand for new trial after Nebraska Supreme Court reversal of the trial verdict.[1] Of these 15 cases, not one was remanded for trial court consideration of a pure legal question in any context.[2]

With the above history, it is difficult to explain the actions and rationale of the Nebraska Supreme Court in another case involving Cornhusker that just was decided by the Nebraska Supreme Court. *Cornhusker Christian Childrens Home v. Dep't of Social Services,* 229 Neb. 837, — N.W. 2d — (decided on September 23, 1988 and hereinafter cited as Cornhusker II). As in this case, in Cornhusker II Cornhusker litigated claims based on state and federal constitutional grounds. As in this case, in Cornhusker

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[1]Those 15 cases are: *State v. Jackson,* 226 Neb. 857, 415 N.W.2d 465 (1987); *State v. Lofquest,* 223 Neb. 87, 388 N.W.2d 115 (1986); *Younkin v. Younkin,* 221 Neb. 134, 375 N.W.2d 894 (1985); *State v. Williams,* 220 Neb. 415, 370 N.W.2d 150 (1985); *State v. Malek,* 219 Neb. 680, 365 N.W.2d 475 (1985); *State v. Williams,* 218 Neb. 618, 358 N.W.2d 195 (1984); *State v. Waterman,* 215 Neb. 768, 340 N.W.2d 438 (1983); *State v. Steinmark,* 201 Neb. 200, 266 N.W.2d 751 (1978); *State v. Ernest,* 200 Neb. 615, 264 N.W.2d 677 (1978); *State v. Svoboda,* 199 Neb. 452, 259 N.W.2d 609 (1977); *State v. Ford,* 198 Neb. 376, 252 N.W.2d 643 (1977); *State v. Virgilito,* 187 Neb. 328, 190 N.W.2d 781 (1971); *State v. Fugate,* 180 Neb. 701, 144 N.W.2d 412 (1966); *Sioux City Bridge Co. v. Dakota County,* 110 Neb. 597, 194 N.W. 729 (1923).

[2]All of the cases were remanded for an evidentiary hearing; in all but one the Supreme Court decided that the district court erred in failing to grant a requested evidentiary hearing in the first place. The final case, *Sioux City Bridge Co. v. Dakota County, supra,* was one that was tried on the wrong legal theory. In the exercise of its equity jurisdiction the court permitted a remand so that evidence might be admitted relevant to the theory on which the case should have been tried.

II the trial decision was rendered by a judge no longer sitting on the trial court. As in this case, in Cornhusker II the trial decision was in favor of Cornhusker on the state ground. As in this case, in Cornhusker II the federal ground was not directly decided. As in this case, in Cornhusker II both state and federal grounds were raised on appeal to the Nebraska Supreme Court. As in this case, in Cornhusker II the Nebraska Supreme Court reversed on the state ground. As in this case, in Cornhusker II the Nebraska Supreme Court refused to consider the federal ground also raised. As in this case, in Cornhusker II the federal ground involved a pure legal question on a fully developed record. But unlike this case, and without even a motion by Cornhusker (and notwithstanding Nebraska appellate procedure since 1944), in Cornhusker II the Nebraska Supreme Court did not enter judgment but instead remanded the matter to the district court for further proceedings. *Id* at 842.

Cornhusker is well aware that the litigational history of Cornhusker II colors its ability to succeed on appeal in the case now before this Court. Cornhusker has moved for rehearing in Cornhusker II and is requesting either that the Nebraska Supreme Court decide the federal constitutional question itself or that it stay further state court proceedings pending this appeal. (The reasons to be argued to the Nebraska Supreme Court are the ones argued to this Court in this Reply Brief: in the litigational context of both Cornhusker cases a remand is unconstitutional.) Cornhusker has difficulty explaining why, when explicitly asked in this case, the Nebraska Supreme Court would refuse any consideration of a dispositive federal question, and then, after Cornhusker proceeded to the expense and effort of this appeal, why the Nebraska Supreme Court would change its procedural tack in a second case involving both the same procedural posture and the same litigants.

Cornhusker continues to urge this Court both to cure the unconstitutional Nebraska procedure and to decide the substantive merits of its claims. A holding by this Court

that Nebraska appellate procedure is unconstitutional will resolve the identical procedural question sitting in Cornhusker II and permit Cornhusker to proceed to the substantive federal constitutional merits before the Nebraska Supreme Court in Cornhusker II. A holding on the substantive merits by this Court would permit Cornhusker expeditious resolution of its federal constitutional claims here. The actual and projected litigation expenses are fast becoming prohibitive. Cornhusker did everything possible to get the Nebraska Supreme Court to consider its federal constitutional claims before appealing to this Court. A remand now to allow the Nebraska Supreme Court finally to fulfill its constitutional responsibilities in a federalist system is a bonus to a recalcitrant court and an additional, costly, and time-consuming burden to a litigant which not only did everything right but which already suffers from prolonged submission to a "putatively illegal" regulation. Cornhusker thus urges this Court to take the Nebraska Supreme Court at its word and decide the federal question the Nebraska Supreme Court repeatedly and explicitly refused to consider.

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CONCLUSION

For these reasons, and those set forth in the Jurisdictional Statement, Cornhusker urges this Court to note probable jurisdiction of this appeal.

Respectfully submitted,

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